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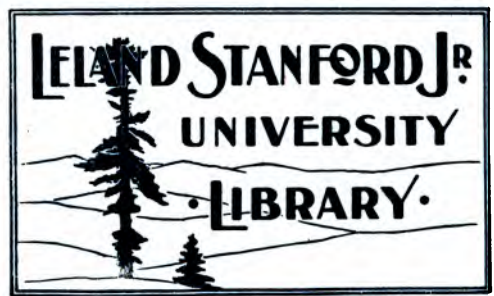
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WITH  
*Notes of Judicial Decisions,*  
AND AN  
APPENDIX OF FORMS.

---

BY D. P. BELKNAP,  
COUNSELLOR AT LAW.

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## INTRODUCTION.

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THE preparation of the present volume, was suggested by the lack of uniformity observable in proceedings under the statute relative to the estates of deceased persons, and the diverse and often conflicting views of practitioners as to the proper forms to be employed and the correct practice to be followed—matters which necessarily fell under my notice while acting as Clerk of the Probate Court in the city and county of San Francisco.

It occurred to me that a careful compilation of all the statutes of our State relating to proceedings in the Probate Courts, with the amendments thereto, accompanied by a body of forms and precedents, for all such proceedings, would, even if imperfectly executed, constitute a work useful to those having occasion to practice in these courts, and also to executors, administrators and guardians,—and to all, in short, connected with or interested in the management and settlement of the estates of deceased persons.

In the present work, which is prepared to meet the want thus existing, will be found a full collection of the various statutes of this State appropriate to the subject, with notes under the respective sections and chapters, of all decisions of our Supreme Court applicable, and of such other authorities within my reach as seemed in point. A large number of the latter are cases from the Texas Reports, the probate system of that State, in many respects, very closely resembling our own.

The Forms contained in the Appendix are, in part, selected from the Records of the Probate Court of this County, and in part drawn from the Statute for the purpose of this work; and will be found, I think, to contain precedents for all ordinary proceedings embraced under the statutes selected.

I have been much aided in my labors by Jas. F. Bowman, Esq., to whose assistance I am greatly indebted for an early completion of the work.

D. P. BELKNAP.

SAN FRANCISCO, July 26th, 1858.

## ERRATA.

Page 81, note to section 195, read "See Sec. 136," for "See Sec. 131."

Page 81, in the last line of the note under section 195, read "See *Cole vs. Robertson*, noted at the end of chapter VI," instead of "See *Cole vs. Robertson*, noted under section 131."

Form No. 8, of Appendix, second paragraph, for "Westchester, State of California," read "Westchester, State of New York."

Form No. 77 of Appendix, to the affidavit of Robert C. Johnson, after the words "is justly due to this claimant" add "that no payments have been made thereon, and that there are no offsets to the same to the knowledge of deponent." See the affidavit of N. Luning, in the preceding Form, No. 76.



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## TERMS OF PROBATE COURTS,

IN THE DIFFERENT COUNTIES OF THE STATE.

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Alameda.....	3d Mondays of January, March, May, July, September and November.
Butte.....	4th Monday in February and May; Third Monday in August, and Second Monday in December.
Calaveras.....	1st Monday January, April, July; 3d Monday October.
Colusi.....	1st Monday January, March, May, July, September and November.
Humboldt.....	2nd Monday February, April, June, August, October and December.
Merced.....	1st Monday January, March, May, July, Sept. and November.
Monterey .....	1st Monday February, April, June, August, October and December.
Napa.....	3d Monday March and July; and 2nd Monday of November.
San Bernardino..	4th Monday January, April, July and October.
San Francisco...	3d Monday January, March, May, July, Sept. and November.
San Luis Obispo..	4th Monday January, April, July and Oct.
San Mateo.....	Tuesday after County Court; County Court, 1st Monday March, July and November.
Santa Barbara...	4th Monday January, April, July and Oct.
Santa Clara.....	4th Monday February, June and October.
Santa Cruz.....	1st Monday February, April, June, August, October and December.
Sierra.....	1st Monday May, August, October and Dec.
Siskiyou.....	1st Monday January, April, October; 3d. Monday July.
Solano.....	4th Monday January, April, July and October.
Sonoma.....	1st Monday January, April, July and October.
Tehama.....	1st Monday February, April, June, August, October and December.
Tuolumne.....	1st Monday February, June and October.
Yolo.....	1st Monday January, March, July, September and November.

In all the counties not named above, the regular terms are held on the fourth Monday of each month. See p. 18, *post*.

ORGANIZATION AND JURISDICTION  
OF THE  
PROBATE COURTS  
OF CALIFORNIA.

---

The Constitutional and Statutory provisions relating to the organization and powers of the Courts of this State, having cognizance of Probate proceedings, are as follows.

I.—THE PROBATE COURT.

Section 8 of Article VI. of the Constitution provides that :

“ There shall be elected in each of the organized counties of this state, one county judge, who shall hold his office for four years. He shall hold the county court and perform the duties of Surrogate, or probate judge.”

Chapter VII. of the Act of May 19, 1853, “ concerning courts of justice and judicial officers,” provides as follows :

THE PROBATE COURT.

§ 61. There shall be in each county, a probate court with the jurisdiction conferred by this chapter. (Embracing sections 61 to 65 inclusive).

§ 62. The county judge of each county shall be the judge of the probate court.

§ 63. The probate court shall have power to open and receive the proof of last wills and testaments, and to admit them to probate ; to grant letters testamentary, of administration, and of guardianship, and to revoke the same for cause shown according to law ; to compel executors, administrators and guardians, to render an account when required, or at the period fixed by law ; to order the sale of property of estates or belonging to minors ; to order the payment of debts due by estates ; to order and regulate all partitions of proper-

ty or estate of deceased persons ; to compel the attendance of witnesses ; to appoint appraisers or arbitrators ; to compel the production of title deeds, papers, or other property of an estate, or of a minor ; (a) and to make such other orders, as may be necessary and proper, in the exercise of the jurisdiction, conferred upon the probate court.

§ 64. The county judge shall have power in vacation, to appoint appraisers, to receive inventories and accounts to be filed in his court ; to suspend the powers of executors, administrators, or guardians in the cases allowed by law ; to grant special letters of administration or guardianship ; to approve claims and bonds, and to direct the issuance from this court, of all writs and process necessary in the exercise of his powers as probate judge.

§ 65. The county judge of the county of San Francisco, shall hold a probate court, at the city of San Francisco, on the third Monday of January, March, May, July, September and November ; *provided*, that each term of said court shall continue until the commencement of the next term, unless all the business of the court be sooner disposed of. In the other counties of the State, the county judge shall hold a probate court on the fourth Monday of each month.

By the Act of March 27, 1858 (stat. of 1858, p. 95), entitled " An Act to give to the proceedings of courts of probate, the same effect as courts of general jurisdiction," it is provided as follows :

§ 1. That the proceedings of the courts of probate, within the jurisdiction conferred on them by the laws, shall be construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction ; and that the records, orders, judgments, and decrees, of the said probate courts, shall have accorded to them, like force and effect, and legal presumptions, as the records, orders, judgments, and decrees of the district courts.

§ 2. This act shall take effect only upon proceedings had or taken after its passage.

The foregoing sections, together with those contained in the probate act, comprise all the statutory provisions defining and specifying the jurisdiction and powers of the probate courts of this State; and to this statutory jurisdiction, they are strictly limited. The Supreme Court has repeatedly held them to be inferior courts, of special and limited jurisdiction, incapable of exercising any powers, or administering any remedies, other than those expressly conferred, and prescribed by statute.

(a) Compare Section 117 of the Probate Act, *post*.

The act of 1858, though it does not at all enlarge *the jurisdiction* of the probate courts, essentially modifies the strictness of the doctrine laid down in some of the authorities, in reference to the effect of their proceedings, and their powers in the exercise of their acknowledged jurisdiction. (a)

## II.—THE DISTRICT COURTS.

### THEIR JURISDICTION WITH REFERENCE TO PROBATE PROCEEDINGS.

Section 6, of Article VI. of the Constitution, provides that—

“The district courts shall have original jurisdiction in law and equity, in all civil cases, where the amount in dispute exceeds two hundred dollars, exclusive of interest, and in all issues of fact, joined; in the probate courts, their jurisdiction shall be unlimited.”

#### (a) *The Jurisdiction and General Powers of Probate Courts.*

In New York, and in some of the other States, certain incidental and constructive powers have been claimed for Surrogates' courts, as essential to the due exercise of the jurisdiction expressly conferred by law, and as being to that extent, inherent in all courts. A section of the New York Revised Statutes, as originally enacted, declared that “*no Surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this State.*” (2 R. S. 1st ed., p. 221.) This restrictive clause was subsequently repealed (Laws of N. Y., 1837, p. 536), and since such repeal, the exercise of powers not enumerated in the statute, has been repeatedly sustained by the appellate courts of that State. Thus it has been held, that the Surrogate had power to vacate or set aside an irregular or *ex parte* order made by him, instead of putting the party to his appeal; to open a decree taken by default; to enter an order *nunc pro tunc*, if by inadvertence it was not entered at the proper time, and the like. (See 9 Paige, 128; 10 Paige, 316; 1 Bradford's R., 283; 1 Barb. Ch. R., 452, and the cases noted *infra*.)

The following cases, most of them decided in the Supreme Court of this State, bear more or less directly upon this question, in regard to the general powers and authority of Probate Courts, where not expressly marked out and defined by statute.

The Probate Court is an inferior court, and cannot take jurisdiction or administer remedies, other than those given in, and in the manner prescribed by, statute. *Grimes' Estate v. Norris*, 6 Cal. R., 621.

Probate Courts are courts of inferior and limited jurisdiction, and in pleading their judgments it is necessary to set out the facts which gave jurisdiction. *Smith v. Andrews*, 6 Cal. R., 652.

Proceedings in Probate Courts are summary and special, and must be in strict conformity with the law. Opinion, in *Beckett v. Selover*, 7 Cal. R., January Term.

The Probate Court is a court of special and limited jurisdiction. Though a settlement in the probate court is a final settlement, a complainant no party to it, may treat it as a nullity, and invoke the equitable powers of the district court, and compel the administrator to a full account. *Clark v. Perry*, 5 Cal. R., 58.

The District Courts of this State have the same control over the estates and persons of minors that the Courts of Chancery in England possess. This jurisdiction is conferred by the Constitution (art. vi, section 6), and cannot be divested by any legislative enactment. And the claim of exclusive, original jurisdiction in courts of probate, over the same subject matter is unfounded. *Wilson et al. v. Roach et al.* 4 Cal. 362.

The Probate Court has jurisdiction to try and determine issues of fact arising in proceedings before it. And the issues of fact joined in the probate court, which are sent to the district court for trial, are of that class upon which the probate judge is unwilling to pass his judgment, or where from great conflict of evidence a reasonable doubt must exist in his mind, as to which side has the right. *Keller v. Franklin*, 5 Cal. R. 432.

The allegations in a petition for administration are not sufficient to give the court jurisdiction, unless proper notice be given to bring the parties before the court. But if proper

This section has been the subject of judicial construction by the Supreme Court. In the case of *Reed et al. v McCormick*, 4 Cal. R., 342, the court says :

"The sixth section of Article VI. of the Constitution, which provides that in all issues of fact, joined in the probate courts, the jurisdiction of the district courts shall be unlimited, does not give the district courts appellate jurisdiction from the probate courts. The word "unlimited," qualifies the amount in value, and not the term "original." "Issues of fact," etc., refer to issues to be tried."

And see *Wilson et al. v Roach et al.* 4 Cal. R., 362. Also, the opinion in *Beckett v Selover*, 7, Cal. R., January term.

Section 19 of the Judicial Act (stat. 1853, p. 287) provides that, in all issues of fact joined in the probate courts, the jurisdiction of the district courts shall be unlimited.

The language of this section, follows that of section 6, of article

notice was *in fact* given, and the *proof* was merely defective, it would seem competent for the court to receive another affidavit of the clerk, and file the same *nuuc pro tunc*. *Beckett et al. v. Selover*, 7 Cal. R., January Term.

The Probate Court has no power to direct that the portion of an estate of an intestate originally allotted to one of the heirs at law, a non-resident heir, shall be distributed among the other heirs, if the non-resident heir shall fail to appear and claim it within a year. The money should be paid into the State Treasury until claimed by the owner or his representatives. *Pyatt v. Brockman*, 6 Cal. R. 418.

The power of the probate judge, to remove in his discretion an administrator for any of the causes named in the statute, will not be interfered with by the appellate court, unless it should be clearly shown that there has been gross abuse of discretion. *Deck's Estate v. Gherke*, 6 Cal. R. 666.

Letters of guardianship of a lunatic issued by a probate court cannot be questioned in a collateral proceeding. *Warner et al. v. Wilson*, 4 Cal. R., 810.

And generally, when a probate court, having acquired jurisdiction, has decided any point legitimately before it, its decision cannot be called in question except by proceedings in that court. The plaintiff having been pronounced *non compos mentis* by the probate court, and a guardian appointed, the plaintiff afterward transacted some business, and the validity of the transaction being called in question, defendant offered to prove, as matter of fact, that plaintiff was of sound mind at the time. *Held*, that the decision could not be questioned in that manner. *Leonard v. Leonard* 14 Pickering, 283.

An administrator having resigned on settlement, the judge of the probate court found him indebted to the estate in the sum of \$16,000, and ordered him to pay it into court, and upon his refusal the heirs brought suit on his administration bond. *Held*, that there was no law making the probate judge a fiscal agent, and the decree for the payment of money into court was *coram non judge*. *Wilson et al. v. Hernandez*, 5 Cal. R. 437.

A grant of administration originally *void*, and not merely *voidable*, acquires no validity from an acquiescence of twenty years. *Holyoke v. Haskins*, 5 Pickering, 20. and see *Ex parte Barker*, noted under section 2 of the Probate Act. *post*.

Unless the court has jurisdiction the proceedings, however regular, cannot be sustained even when called in question *collaterally*, as in a case where administration is granted by a probate court of the wrong county. *Beckett et al. v. Selover*, 7 Cal. R., January Term.

Surrogates' courts proceed according to the course of the common and ecclesiastical law, as modified by statutory regulations. Where jurisdiction is given by statute, the mode of exercising it, in cases not specially provided for, must be regulated by the court in the exercise of a sound discretion, according to circumstances. *Campbell v. Logan*, 2 Bradford's R. 90.



VI. of the constitution, and the construction given to the latter, in the case of *Reed v. McCormick*, above cited, is equally applicable to it.

Section 21, of the same act, provides that the appellate jurisdiction of the district courts shall extend to the hearing upon appeal, "an order or judgment of the probate court in the cases prescribed by statute."

Sections 363 to 365 inclusive, of the Practice Act, prescribe the cases in which appeals may be taken from a probate court to a district court, the time within which such appeal must be taken, etc.

But the above sections of the Judicial Act, and of the Practice Act, have been declared unconstitutional, so far as they undertake to confer *appellate jurisdiction* upon the district courts. (a)

It has also been held, that, inasmuch as the power to try *de novo*, issues which have been tried and decided, necessarily includes the power to reverse or modify such decisions, issues of fact already passed upon in the probate court cannot be transferred to the district court for trial; and so much of the act of May, 7, 1855 (amending the Probate act), as provides for such transfer, has been declared unconstitutional. See *Deck's Estate v. Gherke*, 6, Cal. R. p. 666.

Accordingly, no appeal can now be taken from the probate to the district court; nor can issues of fact be transferred to the latter, after being passed upon in the probate court. And the jurisdiction of the district courts, in probate proceedings, may now be considered as extending only to the trial of issues of fact certified to it, as provided by statute (b), and to the exercise of those general powers with reference to the estates and persons of minors, and the like matters, which it possesses by virtue of the equity jurisdiction, conferred upon it by the constitution. (c)

## PRACTICE

### IN PROBATE PROCEEDINGS.

Section 293 of the Probate Act, provides that: the practice in the district court shall be applicable to proceedings in the probate court, so far as the same does not conflict with any enactment specially ap-

(a) *People v. Peralta*, 3 Cal. R., 379; *Caulfield v. Hudson*, *ibid*, 389; *Hernandez v. Simon* *ib.*, 464; *Reed v. McCormick*, 4 Cal. R. 342; *Townsend v. Brooks*, 5 Cal. R. 52; *Deck's Estate v. Gherke*, 6 Cal. R. 666.

(b) See Title "Practice," etc., next page.

(c) See Sec. 6 of Article vi, of the Constitution, *ante*, p. 19. Also *Wilson et al. v. Roach et al.*; *Clark v. Perry*, and *Keller v. Franklin*, cited in note (a) *ante*, p. 19.

plicable to the probate court, or is not inconsistent with the provisions of the probate act, or the act to provide for the appointment, and prescribe the duties of guardians.

#### ISSUES OF FACT.

Issues of fact joined in the probate court, may be tried in that court in all cases, where neither party elects to transfer the same to the district court, unless the probate judge shall, of his own motion, send it to the latter court for trial by jury, which he may do in his discretion.

In the mandamus case, *Gherke v. Freelon*, July Term, 1855, the Supreme Court held that it was discretionary with the probate judge to order or certify an issue of fact to a district court, to satisfy his conscience on some disputed point, in accordance with the practice which prevails in courts of chancery.

But since the amendments of 1855 to the Probate Act, below referred to, it would seem to be obligatory upon the probate judge to certify such issues to the district court for trial, upon the application of either party.

Section 20 of the Probate Act, as amended April 23, 1855, provides for the trial of issues joined in the probate court, on applications for the probate of wills. (See sec. 20, *post*.)

Section 294, as amended May 7, 1855, provides that in the cases enumerated therein, issues of fact joined in the probate court shall be certified for trial to the district court of the county, on the application of any person interested in, or affected by, the decision thereof.

Section 314 (added by the amendment of April, 23, 1855) provides that, all other issues of fact joined in the probate court shall be disposed of in the same manner, as is provided in section 20, for issues joined on application for the probate of wills.

In regard to the manner of making up issues of fact, to be tried in the district court, and the proceedings thereon, see sections 20, 294 to 296 inclusive, and 301 of the Probate Act, *post*.

#### APPEALS FROM THE PROBATE COURT.

Sections 363 to 365 inclusive, of the Practice Act, prescribe the cases in which appeals may be taken from the probate to the district court, the time in which they must be taken, etc.

But the appellate jurisdiction conferred by the statute upon the district courts having been declared unconstitutional (*ante* p. 21), no appeal can now be taken from an order or judgment of a probate court, except to the Supreme Court, as provided by the Probate Act.

The cases in which such appeals may be taken, the time within which they must be taken, the manner in which they must be perfected, etc., are prescribed in sections 297 to 302 inclusive, of the Probate Act, which see, *post*.

Section 300 provides, that the provisions (as amended) of the Practice Act, in regard to appeals to the district court, (sections 363, 365) shall still be applicable to appeals from the probate court, "so far as they do not conflict with the provisions of this act."

See sections 297 to 302 of the Probate Act, *post*, and the notes to those sections.

In regard to actions by and against executors and administrators, and other matters of practice, see the several sections of the Act, *post*.

# ESTATES OF DECEASED PERSONS.

AN ACT TO REGULATE THE SETTLEMENT OF THE ESTATES OF DECEASED PERSONS,  
PASSED MAY 1, 1851.

*The People of the State of California, represented in Senate and  
Assembly, do enact as follows :*

## CHAPTER I.

### JURISDICTION.

§ 1. The county court, when sitting for the transaction of probate business, shall be known and called the "Probate Court," and the county judge shall be *ex-officio*, probate judge. (a.)

Probate Court  
and Judge.

§ 2. Wills shall be proved, and letters testamentary, or of administration, shall be granted : 1st. In the county of which the deceased was a resident at, or immediately previous to his death, in whatever place his death may have happened. 2d. In the county in which he may have died, leaving estate therein, and not being a resident of the state.

In what Coun-  
ty wills to be  
probated, etc.

(a.) There has been some diversity of opinion in regard to the proper title of the county judge, sitting as judge of the probate court, and the particular form in which orders etc., made in proceedings in the probate court, to which his signature is requisite, should be signed : as, whether the signature should be—"A. B., county judge," or "A. B., county judge and ex-officio, judge of the probate court,"—or, simply, "A. B., probate judge." The constitution (article 6, section 8,) provides that the "county judge" "shall hold his office for four years," and "shall perform the duties of surrogate or probate judge."

Section 61 of the act of May 19, 1853, concerning "courts of justice" etc., provides that, "there shall be in each county, a probate court" etc ; and sec. 62 enacts that, "the county judge shall be the judge of the probate court." In the "act to regulate the settlement of the estates of deceased persons," the titles of "probate court," and "probate judge," are uniformly employed. The latter title is now adopted in the probate court of the city and county of San Francisco, in all proceedings therein.

3d. In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death. (a.)

The meaning of this provision, (subdivision 1 of sec. 2) is, that administration must be granted *in the county of which deceased was a resident at the time of his death*; and the words, "or immediately previous to," must be considered as mere surplusage: *Beckett et al. v. Selover*, 7 Cal. R., January term.

It is the object of the law, that administration should not be granted until the death of the party, and only one administration within the state; it therefore makes his residence at the time of his death, the test by which to determine where the grant should be made. Accordingly, these two facts must be alleged in the petition; and they must be true in fact. If not true in fact, the proceedings are *void*; and the decision of the probate court upon these jurisdictional facts is not conclusive upon any one not actually before the court. *Ibid.*

And, unless the court *has jurisdiction*, the proceedings, however regular, cannot be sustained, *collaterally*, as in a case where administration is granted by a probate court of the wrong county. *Ibid.*, and cases cited in the opinion.

The probate court cannot refuse to hear testimony to show that the deceased was not at the time of his death, a resident of the county where the estate was being administered. *Ibid.*

In the provisions of the statutes relating to testamentary matters, the terms "resident" and "inhabitant" have the same purport, and are to be construed in reference to the *domicil* of the decedent. A domicile once acquired, continues till another has been gained *animo et facto*. *Isham v. Gibbons*, 1 Bradford's R., 70.

Letters granted by a court having no jurisdiction *are void*; and the court having jurisdiction, may proceed to grant letters *without a revocation of those previously issued*. *Ex parte, Barker*, 2; *Leigh*, 719, and see *Holyoke v. Haskins*—noted *ante* p. 20.

§ 3. When the estate of the deceased is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary, shall have exclusive jurisdiction of the settlement of the estate.

When jurisdiction decided by first application.

(a) *Quære*. In the case of a non-resident of the State dying in one county, and leaving estate in another, but none in the county in which he died—where is administration to be granted? Such a case does not seem to be provided for in the statute, which gives jurisdiction, neither to the probate court of the county in which he died, nor of that in which he left estate; and a resort to the equity powers of the district court of the county in which the estate was situated, would seem to be necessary.

## CHAPTER II.

### OF THE PROOF OF WILLS. (a.)

§ 4. Any person having the custody of any will, shall, within thirty days after he shall have knowledge of the death of the testator, deliver it into the probate court which has jurisdiction of the case, or to the person named in the will as executor.

Person having custody of will to deliver it into probate court.

See *post*, sec. 13.

§ 5. Any person named as executor in any will, shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named executor, present the will, if in his possession, to the probate court which has jurisdiction.

Executor must present will, etc.

§ 6. If he intends to decline the trust, he shall, at the same time, file his renunciation in writing ; if he intends to accept, he shall present with the will, a petition praying that the will be admitted to probate, and that letters testamentary be issued to him.

Renunciation, or petition by executor.

[Forms No. 1 to 10, Appendix.]

§ 7. Every person who shall neglect to perform any of the duties required in the preceding sections, without reasonable cause, shall be liable to every person interested in the will, for the damages they may sustain in consequence of such neglect.

Penalty for non-compliance.

§ 8. Any person named as executor in a will, though the will is not in his possession, may present his petition to the probate court which has jurisdiction, praying that the person in possession of the will may be required to produce it, that it may be admitted to probate, and that letters testamentary may be issued to him.

Petition for probate, where executor is not in possession of will.

[Forms No. 7, 18, Appendix.]

§ 9. Any person having an interest in the will, may, in like manner, present a petition praying that it may be required to be produced and admitted to probate.

Petition by person having an interest in the will.

[Form No. 7, Appendix.]

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[a.] The decisions of the courts of this State bearing upon the matters treated of in this division of the Statute, and not more properly falling under some particular Section, are collected at the end of the chapter.

§ 10. If it be alleged in any petition that any will is in the possession of a third person, and the court shall be satisfied that the allegation is correct, an order shall be issued and served upon the person having possession of the will, requiring him to produce it at a time to be named in the order.

Order for production of will when in possession of a third party.

[Forms No. 7, 18, Appendix.]

§ 11. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court, be committed to the jail of the county, and be kept in close confinement until he shall produce the will.

Penalty for disobeying order.

[Forms No. 65, 66, Appendix.]

Compare Sec. 63 of the Judicial Act, *ante* p 17, and Sec. 117, *post*.

§ 12. Applications for the probate of a will, or for letters testamentary, may be made to the probate judge out of term-time, and he may also, out of term-time, issue all necessary orders and warrants to enforce the production of any will.

Applications and orders may be made out of term time.

§ 13. When any will shall have come into the possession of the probate court, the court shall appoint a time for proving it, which shall not be less than ten, nor more than thirty days, and shall cause notice to be given thereof, by publication, not less than twice a week, in some newspaper, if there is one printed in the county, if not, by notices in writing posted in three public places in the county.

Court to appoint time for proving will.

Notice thereof to be given.

[Forms No. 13, 11, Appendix.]

§ 14. If the heirs of the testator reside in the county, the court shall also direct citations to be issued and served upon them to appear and contest the probate of the will at the time appointed.

Citation to heirs, if they reside in the county.

[Form No. 12, Appendix.]

As to service of Citation, see Sections 288-290, inclusive, *post*.

§ 15. If the will is presented by any other person than the one named as executor, or if it is presented by one of several persons named as executors in the will, citations shall also be issued and served upon such person or persons, if resident within the county.

Citations to co-executors, etc.

[Form No. 12, Appendix.]

§ 16. The court shall also direct subpoenas to be issued to the subscribing witnesses to the will, if they reside in the county.

Subpoenas to subscribing witnesses.

**§ 17.** At the time appointed, or at any time to which the hearing may be continued, upon proof being made that notice has been given as required in the preceeding sections, the court shall proceed to hear the testimony to prove the will.

[Form No. 16, Appendix.]

Who may contest will. Court to appoint attorney for minors, etc.

**§ 18.** Any person interested, may appear and contest the will. If it appear that there are minors who are interested, or persons residing out of the county, the court shall appoint some attorney to represent them.

[Form No. 19, Appendix.]

A creditor, or other party in interest, may contest the will. Whether the objector be a creditor may be disputed. The oath of the objector is sufficient in the first instance, but if the demand be denied, he must set forth the particulars of his debt so as to show its nature and basis. When the question of interest is raised, adverse testimony will only be received where it is a *question of substance*; but on an application for an inventory,—an account;—for increased security, &c., the positive oath, with facts showing interest, will suffice, and the merits of the claim will not be tried. *Burwell v. Shaw*, 2 Bradford's R., 322. *Cotterell v. Brock*, 1 Bradford's R., 148.

A legatee may intervene to oppose proof of a codicil revoking his legacy. *Walsh v. Ryan*, 1 Bradford's R., 433. And see *Beard v. Knox*, noted at the end of the chapter.

It seems that a party who has not filed allegations against the validity of a will, and who has not appealed, cannot contest the probate on allegations filed and appeal taken by another party. But when upon allegations it has been fully determined that the will is not sufficiently proved, any of the next of kin, not a party to the contest, may avail himself of the decision, though it was not obtained at his instance. *Mason v. Jones*, 2 Bradford's Reports, 325.

Probate where will is not contested.

**§ 19.** If no person shall appear to contest the probate of a will, the court may admit it to probate, on the testimony of one of the subscribing witnesses only, if he shall testify, that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

[Forms No. 20, 21, 23, Appendix.]

See Section 24, *post*, and cases noted.

Party contesting will to file grounds of opposition.

Issues of fact how tried.

**§ 20.** If any person appears and contests a will, he shall file a statement in writing of the grounds of his opposition; when any issue or issues of fact shall be joined in the probate court, respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under re-



strant or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will, such issue or issues shall, at the request of either of the parties interested, be certified immediately to the district court of the proper county, for trial by jury; or may, by consent of the parties, be tried by the probate court. Issue shall be deemed joined by the filing of the grounds of opposition as aforesaid, with the clerk of the probate court. Such issue or issues of fact, shall be made up and tried in the same manner as is or may be provided by law, for the trial of issues of fact in other cases; upon determination of such issue or issues of fact, the jury trying the same shall render a special verdict thereon, and the finding of the jury shall be certified by the district court to the probate court, whereupon the probate court shall proceed to admit said will to probate, or not, according to the facts found and the law. (a.)

Issue when deemed joined.

Issues how made up and tried.

Special verdict to be rendered.

Proceedings of probate court thereupon.

[Forms No. 24, 25, 26, Appendix.]

Compare sections 294, 295, 296 and 301, *post*, in regard to the manner of the trial in the district courts of issues of fact joined in the probate courts, &c., and see *ante*. p. 20.

§ 21. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity, of any of them, shall be satisfactorily proved to the court.

If will contested, all the subscribing witnesses to be examined.

It is not necessary that both witnesses *should prove that the provisions of the statute as to the mode of execution, were complied with*. Where one witness testified clearly to their performance, and the recollection of the other was vague and indistinct: *Held*, that the proof of execution was sufficient.—*Weir v. Fitzgerald*, 2 Bradford's R., 42.

And see the case of *Peebles v. Case* (where the subscribing witnesses had lost all recollection of the execution of the instrument), noted at the end of the chapter.

§ 22. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator, and the execution of the will; and as evidence of the execution, it may admit proof of the

Proof of will.

(a.) Amended April 23, 1855. All that portion of the present section, from, and including the words, "when any issue or issues of fact shall be joined," in the third line, to the end, was added by the amendment.

Proof by handwriting.      handwriting of the testator, and of the subscribing witnesses, or any of them.

Testimony to be evidence in future litigation.      § 23. The testimony of each witness shall be reduced to writing, and signed by him, and shall be deemed good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State.

[Latter part of form No. 23, Appendix.]

If proved certificate to be attached.      § 24. If the court shall be satisfied upon the proof taken, *or from the facts found by the jury*, that the will was duly executed, and that the testator at the time of the execution was of sound *and disposing* mind, and not under restraint, *undue influence or fraudulent misrepresentation*, a certificate of the proof *and the facts found*, signed by the probate judge and attested by the seal of the court, shall be attached to the will. (a.)

[Forms No. 22, 23, Appendix.]

In case of great physical infirmities, *something more than mere formal proof should be required*. *Additional evidence* to show that the mind accompanied the will, and that its provisions were understood, is necessary. This may be supplied by subscribing witnesses or *aliunde*. *Weir v. Fitzgerald*, 2 Bradford's R., 42.

Defects of the senses do not incapacitate; but, it appearing that the testator being of advanced age, and his hearing and sight impaired, *the circumstances attending the execution of the will should be carefully scrutinized for any traces of imposition or artifice*. *Ibid*.

And see *Mowry v. Silbur*, 2 Bradford's R., 133; *McSorley v. McSorley*, 2 Bradford's R., 188; and *McGuire v. Kerr*, 2 Bradford's R., 244; also, *Burger v. Hill*, noted at the end of this chapter.

Will and testimony to be filed and recorded.      § 25. The will and the certificate of the proof thereof, together with the testimony which has been taken, shall be filed by the clerk, and recorded by him in a book to be provided for the purpose.

Record to be evidence.      § 26. The record of the will, and the exemplification by the clerk in whose custody it may be, shall be received in evidence and be as effectual in all cases as the original would be if proved.

§ 27. All wills which shall have been duly proved and

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(a.) Amended April 23, 1855. The portions of the section in italics, were added by the amendment. Laws of 1851, p. 450; Compiled Laws, p. 379. Laws 1855, p. 132.

allowed in any other of the United States or in any foreign country or State, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate ; *provided* it has been executed in conformity with the laws of this State.

Wills proved in other State, etc., when allowed in this State.

[Form No. 59, Appendix.]

§ 28. When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, the court shall appoint a time of hearing, and notice shall be given in the same manner as in the case of an original will for probate.

Proceedings upon production of foreign will.

[Forms No. 14, 15, Appendix.]

§ 29. If on the hearing it shall appear to the court that the instrument ought to be allowed as the will of the deceased, a copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court.

Effect of will, if allowed.

§ 30. When a will has been admitted to probate, any person interested, may at any time within one year after such probate, contest the same, or the validity of the will. For that purpose he shall file in the court before which the will was proved, a petition in writing containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked.

The probate, etc may be contested within one year.

Allegations against will, etc. to be filed.

[Forms 28 to 30, Appendix.]

See *ante* Sec. 18, and cases cited, and Sec. 67, *post*.

After the admission of a will of personal property to probate, allegations against the validity of the will and its probate, having been filed within the year, it is not sufficient for the executors on the citation to show cause, &c., why the probate of the will should not be revoked, to present the probate of the will as *prima facie* evidence of its validity. If the allegations are sufficiently broad, the will must be proved *de novo*. Though the probate is generally conclusive as to the validity of the will, it is of no force in a proceeding instituted directly to impeach the probate itself. *Collier v. Executors of Idley*, 1 ; *Bradford's R.*, 94. And see *Weir v. Fitzgerald*, noted at the end of this chapter.

§ 31. Upon the filing of the petition, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators, with the will annexed, and to all the legatees named in the will, residing in the State, or to their guardians, if any of them are minors, or their personal representatives, if any of them are

Citations to be issued to parties interested.

dead, requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

[Forms No. 12, 46 and 51, Appendix.]

**The hearing.** § 32. At the time appointed for showing cause, or at any time to which the hearing shall be continued, personal service of the citations having been made upon any person named therein, the court shall proceed to hear the proofs of the parties. If any devisees or legatees named in the will shall be minors and have no guardians, the court shall appoint some attorney to represent them.

**The court to appoint attorney for minor devisees, etc.**

[Form No. 19, Appendix.]

**Probate, when revoked.** § 33. If, upon hearing of the proof of the parties, the court shall decide that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the probate shall be annulled and revoked.

[Form No. 30, Appendix.]

**Liability of executor, etc., for acts previous to revocation.** § 34. Upon the revocation being made, the powers of the executor or administrator, with the will annexed, shall cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

**Fees and expenses, by whom paid.** § 35. The fees and expenses shall be paid by the party contesting the validity of the will or the probate, if the will or probate be confirmed. If the probate be revoked, the party who shall have resisted the revocation, shall pay the costs and expenses of the proceedings out of the property of the deceased.

[Form No. 30, Appendix.]

**Probate, when conclusive.** § 36. If no person shall, within one year after the probate, contest the same, or the validity of a will, the probate of the will shall be conclusive; saving to infants, married women, and persons of unsound mind, a like period of one year, after their respective disabilities are removed.

**Lost or destroyed will.** § 37. Whenever any will shall be lost or destroyed by accident or design, the probate court shall have power to take proof of the execution and validity of the will, and to establish the same notice, to all persons interested, having been first given as prescribed in regard to proofs of wills in other cases. All the testimony given shall be reduced to writing, and signed by the witnesses.

[Form No. 10, Appendix.]

§ 38. No will shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the life time of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses.

Must have been in existence at time of death, etc.

Its provisions must be proved by two witnesses.

[Form No. 10, Appendix.]

A will cannot be proved as a lost or destroyed will, unless it is shown to have been in existence at the death of the testator, or to have been fraudulently (or *accidentally*) destroyed in his life time. And when the will is last traced to the possession of the testator, and on his decease cannot be found after proper inquiry and examination, the *presumption* is that it was destroyed by the testator, *animo revocandi*. *Buckley v. Redmond* 2 Bradford's R., 282. And see *Holland v. Ferris*, 2 Bradford's R., 334.

§ 39. When any will shall be established, the provisions thereof shall be distinctly stated and certified by the probate judge, under his hand and the seal of his court; and the certificate, together with the testimony upon which it is founded, shall be recorded as other wills are required to be recorded, and letters testamentary or of administration with the will annexed, shall be issued thereon, in the same manner as upon wills produced and duly proved.

Provisions of will to be certified by probate judge.

Certificate and testimony to be recorded, &c.

[Form No. 10, Appendix.]

§ 40. If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration be granted on the estate of the testator, or letters testamentary of any previous will of the testator be granted, the court shall have authority to restrain the administrators or executors so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

Power of court to restrain administrator or executor appointed before or during pendency of application to prove lost or destroyed will.

Cases bearing upon the general subject of the preceding division of the statute:

Wills under the Spanish and Mexican law, and questions arising upon the probate of the will of a Mexican citizen of California, executed September, 1856, considered and discussed. *Panaud v. Jones*, 1 Cal., 488.

The taking of a legacy by the wife, under the will of the husband, will not prevent her from contesting the validity of the will, so far as it disposes of the one-half interest in the common property to others. *Beard v. Knox*, 5 Cal., 252.

She is entitled to her own share of the common property, and to the legacy out of the share of her husband. *Id.*

On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness, by holding

lands devised therein in trust for a devisee, and without having any interest himself therein. *Peralta v. Castro*, 6 Cal., 354.

If a will be properly proved, it is the duty of the surrogate to admit it to probate without inquiring as to its *effect or construction*, except so far as may be necessary to determine which *is* the last will, when there are several instruments inconsistent with each other. *Van Wert v. Benedict*, 1 Bradford's R., 114.

Though there can be but one last will, yet *several papers, taken together, may constitute* the last will. *Ib.*

Although a will has been admitted to probate, a legatee under a later will may propound the latter for probate; and is not concluded by the probate of the previous will. *And if the two instruments are not entirely inconsistent, both taken together may be declared to constitute the last will of deceased.* *Weir v. Fitzgerald*, 2 Bradford's R., 42.

See syllabus of same case, noted under sections 21 and 24, *ante*.

If the will *is attested by strangers*, evidence of the signature and handwriting of the testator, may be resorted to for the purpose of showing his identity with the party executing the will. *Mory v. Silbur*, 2 Bradford's R., 133.

If the subscribing witnesses have lost all recollection of the execution of the will, yet if the court be satisfied by other evidence that they witnessed the execution of the will, it may be admitted to probate. The same rules of evidence apply to the proof of wills, as in other judicial investigations; *and the making of the will "may be proved in the the very teeth* of the subscribing witnesses," who may be contradicted in like manner as other witnesses. Having obtained jurisdiction, the surrogate must dispose of the matter according to the established rules of evidence. *Peebles v. Case*, 2 Bradford's R., 226.

Proof of *incapacity* from attacks of *delirium tremens*, receives additional effect from the circumstance of the will being an *unequal* one. *Waters v. Cullen*, 2 Bradford's R., 354.

Besides being satisfied of actual *capacity*, the probate court must determine *whether, in performing the particular act in question, the testator understood the contents and effect of the instrument.* *Burger v. Hill*, 1 Bradford's R., 360.

When] on the probate of a will an alleged codicil is brought in by parties interested, but not cited, the proper course is to direct them to file an allegation propounding it for proof as part of the pending proceedings. *Carle v. Underhill*, 3 Bradford's R., 101.

The prevention of the execution of a codicil by improper means, cannot operate to invalidate the will. A will can only be revoked in the manner and form prescribed by statute. *Leaycraft v. Simmons*, 3 Bradford's R., 35.

And where a testator desired to make a codicil to his will in favor of his daughter; and his son, who had custody of the will, and in whose favor it was made, refused to produce the will at the request of testator for the purpose of alteration: *Held*, that the will was not thereby rendered invalid. *Ib.*

Whether a paper is a will or not, does not depend upon the maker declaring it to be a will, but upon its contents. *Carle v. Underhill*, 3 Bradford's R., 101.

An executor has no authority until the will is proved. *Tucker v. Starks*, Brayt. R., 99.

At common law, the granting of letters testamentary is conclusive proof of the probate of a will. The informalities and irregularities which may appear in the entries of the proceedings of a probate court, will not destroy the effect of a judgment establishing a will. *Denison v. Ingram*, Dallah's Texas Digest, p. 519.

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## CHAPTER III.

### LETTERS TESTAMENTARY AND OF ADMINISTRATION, AND BONDS OF EXECUTORS AND ADMINISTRATORS. (a.)

§ 41. When any will shall have been proved and allowed, the probate court shall issue letters thereon, to the persons named in the will as executors, who are competent to discharge the trust, and who shall appear and qualify.

To whom letters to issue upon probate of will.

§ 42. No person shall be deemed competent to serve as executor who, at the time the will is proved, shall be : 1st., under the age of twenty-one years ; or, 2d., who shall have been convicted of an infamous crime ; or, 3d., who, upon proof, shall be adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding. If any such person be named as the sole executor in any will, or if all the persons named as executors are incompetent, letters of administration with the will annexed, shall be issued.

Who incompetent to serve as executors.

Letters of administration with will annexed, when to issue.

Compare Sec. 55, *post*, and cases there cited.

A person decreed to be a habitual drunkard, is not, *by such decree*, deprived of his power to perform the duties of the office of executor. *Sill v. McKnight*, 7 Watts & Serg., 244.

The person entitled to a preference in administration, cannot be excluded from his right except in the cases enumerated by statute. *No degree of legal or moral guilt or delinquency* will warrant such exclusion short of conviction of an infamous crime. *Harrison v. McMahan*, 1 Bradford's R., 283.

The single fact that the applicant is a professional gambler, is not of itself enough to debar him from the precedence secured him by statute. *Ib.*

§ 43. Any person interested in a will may file objections in writing to the granting of letters testamentary to the

Objections to executor may be filed by party interested.

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(a.) See cases noted at the end of the chapter.

persons named as executors, or any of them, and the objections shall be heard and determined by the court.

[Form No. 31, Appendix.]

See Sec. 18, *ante*, and cases there cited.

Effect of marriage of an executrix.

§ 44. When an unmarried woman, who shall have been appointed executrix, shall marry, her marriage shall extinguish her authority.

See Sec. 56, *post*.

Executor of executor not to administer, etc.

§ 45. No executor of an executor shall, as such, be authorized to administer upon the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator left unadministered, shall be issued.

When minor is named executor.

§ 46. When a person under the age of twenty-one years shall be named executor, letters of administration with the will annexed, shall be granted during the minority of the executor, unless there is another executor who shall accept the trust and qualify; in which case the executor who shall accept the trust and qualify, shall have letters testamentary, and shall administer the estate until the minor shall arrive at full age, when he may be admitted as joint executor.

When all the executors named, are not appointed.

§ 47. When all the executors named shall not be appointed by the court, such as are appointed, shall have the same authority to perform every act, and discharge every trust required by the will, and their acts shall be as effectual for every purpose, as if all were appointed and should act together.

As to the powers, etc., of executors, see chapter VIII., *post*.

Authority of administrators with will annexed.

§ 48. Administrators with the will annexed, shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose.

In general, the term "administrators" in the statutes relative to the estates of deceased persons, includes "administrators with the will annexed," and the latter are subject to all the provisions applicable to administrators generally, except so far as the distribution of the estate is directed by the will. *Ex-parte*, *Brown*, 2 Bradford's R., p. 22.

§ 49. Letters testamentary and of administration with the



will annexed, shall be signed by the clerk and be under the seal of the court.

Letters to be signed, etc.

§ 50. Letters testamentary may be in substantially the following form:—"The State of California, county of ——. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of —, C. D., who is named therein, is hereby appointed executor. Witness, G. H., clerk of the probate court of the county of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk."

Form of Letters testamentary.

§ 51. Letters of administration with the will annexed, may be substantially in the following form:—"The State of California, county of —. The last will of A. D., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of —, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the probate court of the county of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk."

Form of Letters of administration with the will annexed.

§ 52. Administration of the estate of a person dying intestate, shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: 1st., the surviving husband or wife, or such person as he or she may request to have appointed; 2d., the children; 3d., the father or mother; 4th., the brothers; 5th., the sisters; 6th., the grand children; 7th., any other of the next of kin who would be entitled to share in the distribution of the estate; 8th., the public administrator; 9th., creditors; 10th., any person or persons legally competent; *provided*, that when there was any partnership existing between the intestate, at the time of his death, and any other person, the surviving partner shall in no case be appointed administrator of the estate of such intestate. (a.)

Order of administration upon intestates' estates.

Surviving partner in no case to administer.

See Sec. 64, *post*.

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(a.) This section as originally passed, in the statute of 1851, ended with the words, "legally competent." The remainder of the present section, begin-

Proof of desertion, ill-treatment, and the like, *and even an agreement of separation*, are not sufficient to deprive a husband of his right to administer upon his wife's estate. Case of *Altemus*, 1 Ashmead's R., 49.

So, too, if there has been an actual divorce, *a mensa et thoro*. *Clark v. Clark*, 6 Watts & Serg., 85.

That section of the statute which provides that "any other of the next of kin who would be entitled to share in the distribution of the estate," shall be entitled to administer, must be construed to mean the next of kin capable of inheriting, or *who would be entitled to distribution, if there were no nearer kindred*. *Anderson v. Potter*, 5 Cal. R., 63.

The phraseology of the New York statute on the same subject, by which administration is given "to the relatives of the deceased *who would be entitled to succeed to his personal estate*," or "*who would be entitled to share in the distribution of the estate*" (both forms of expression being employed in the same section, 2 Rev. Stat., 3rd ed., p. 138, Sec. 28), is examined and discussed, and a somewhat different construction given to it in the case of *The Public Administrator v. Peters*, 1 Bradford's R., p. 100. The question in that case was, whether a relative of deceased, who had no interest in the estate (*i. e.*, was entitled to no distributive share), was entitled to administration in preference to the public administrator. And it was held that "a relative who has no interest or no title to a distributive share, is to be considered as a stranger."

The Surrogate says, in the opinion in that case, "The counsel for the administrator contended that this expression (*would be entitled*) allows any one to administer before the public administrator who by any possible contingency may be entitled to a share at the time of the distribution; and that any relative therefore, who may, by the decease of the next of kin, be placed in the line of succession, can administer; because, *by possibility, he may be entitled to share in the distribution*. But this is not so; the distributive shares in an estate become vested on the decease of the intestate, according to the relative positions of his next of kin *at that time*." \* \* \* "The rights of all are settled at the time of the decease. The words 'would be' in the statute, cannot refer to what cannot possibly happen." \* \* \* "The nature of a distributive share is sufficiently contingent to justify and account for the use of the subjunctive form in the expression which defines the class of relatives entitled to administration." 1 Bradford's R., p. 103. (a.)

On a contest for preference as to administration between relatives whose priority is not settled by statute, the single point to be ascertained is, who will be entitled to the surplus of the personal estate. *Sweezy v. Willis*, 1 Bradford's R., 495.

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(a.) The same question was raised at the March term (1858) of the probate court of the city and county of San Francisco, upon the adverse applications of R. C. Rogers, public administrator, and M. G. Noble, for letters of administration upon the estate of John C. Cabanis, deceased. Noble claimed the issuance of letters to himself as a second cousin of deceased, though not entitled to a distributive share of the estate, there being nephews of the deceased living out of the State. The matter was fully argued by Eugene Casserly and D. Rogers, Esqs., for the public administrator, and E. D. Baker and W. H. Tompkins, Esqs., for Noble. The court (Blake, probate judge,) held, that the words "next of kin," as used in the seventh classification of persons entitled

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ning with the words "*provided that*," was added by the amendment of April 23, 1855. Original section, statute 1851, p. 454; Compiled Laws, p. 383; amended section, statute 1855, p. 132.

Who are *the next of kin*, is to be determined by the rule of the ecclesiastical law, which, in such matters, is a part of the common law. *Id.*

And see section 4 of the act of April 13, 1850, (section 318, *post.*) to regulate descents and distributions, which provides that, "the degrees of kindred shall be computed according to the rules of the civil law." Compiled laws, p. 188.

A person not entitled to administration, cannot be joined as administrator with one who is entitled, on the suggestion of the surrogate, without or against the consent of the party entitled. *Peters v. Pub. Adm.*, 1 Bradford's R., 200.

§ 53. When there shall be several persons claiming, and equally entitled to the administration, males shall be preferred to females, and relatives of the whole blood to those of the half blood.

Of persons  
equally entitled,  
who have pre-  
ference.

§ 54. When there are several persons equally entitled to the administration, the court may, in its discretion, grant letters to one or more of them.

Discretion of  
Court in granting  
letters.

Between brothers, administration will be committed to the one having most interest to execute it faithfully. *Moore v. Moore*, 1 Dev. N. C. R. 352.

And see *Churchill v. Prescott*, noted under next section.

§ 55. No person shall be entitled to letters of administration who shall be : 1, under the age of twenty-one years ; or 2, who shall have been convicted of an infamous crime ; or 3, who upon proof shall be adjudged by the court incompetent to execute the duties of the trust, by reason of drunkenness, improvidence, or want of understanding.

Persons who  
shall not be en-  
titled to admin-  
ister.

See Sec. 42, *ante*, and cases there cited.

Indebtedness to the estate does not render a person incompetent to administer, nor take away his priority. But where several applicants are equally

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under our statute to administer, mean *the next of kin to the deceased, after those before named in the same section*. "Any person who is in that degree, however remote it may be from the deceased, is entitled to administration if he would be entitled to distribution in case there were no nearer kindred. The persons constituting this seventh class, though often more numerous than those in the preceding classes, are as much as any of them, a class by themselves, as really distinct from the mass of the kindred, and capable of being ascertained with the like legal and actual precision.

"A second cousin may be entitled to administer, because he may be of the 'next of kin.' But if between him and the first six classes enumerated in the statute there are any of a degree of kindred nearer than himself to the deceased, he is not of 'the next of kin,' according to the intentment of the statute. As there are recognized degrees of kindred between those in which the persons named in the first six classes alluded to are placed, and the degree to which a second cousin belongs, Noble, in order to entitle himself to administration, should show that there are no persons living belonging to the intermediate degrees. But as it appears in evidence that the deceased left nephews surviving, it is clear that Noble is not, in the sense of the statute, of the 'next of kin.' His application is accordingly denied, and letters must be granted to the public administrator."

entitled, such a fact may be taken into consideration by the Surrogate in deciding between them. *Churchill v. Prescott*, 5 Bradford's R. 304.

The bare fact that the applicant is a *gambler* will not be sufficient to exclude him as an improvident person; the matter of improvidence, as a disqualification, discussed. *Harrison v. McMahon*, 1 Bradford's R. 288.

Marriage of administratrix.

§ 56. When any unmarried woman, who shall have been appointed administratrix, shall marry, her marriage shall extinguish her authority.

See Sec. 44, *ante*.

Minor.

§ 57. If any person entitled to administration shall be a minor, administration shall be granted to his or her guardian.

Application for letters, how made.

§ 58. Application for letters of administration shall be made by petition in writing, signed by the applicant or his counsel, and filed with the clerk of the court. The petition must state the facts essential to give the court jurisdiction of the case.

[Forms No. 9, 35, 39, 42 and 44, Appendix.]

When granted. § 59. Letters of administration shall only be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.

Notice of application for letters.

§ 60. When any petition praying for letters of administration has been filed, the clerk shall give notice thereof by causing notices to be posted up in at least three public places in the county, one of which shall be at the place where the court is held. The notice shall state the name of the deceased, the name of the applicant, and the term of the court at which the application will be heard. Such notice shall be given at least ten days before the hearing.

What to state.

[Forms No. 17 and 36, Appendix.]

§ 61. Any person interested, may contest the application by filing a written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself.

[Form No. 40, Appendix.]

See Sec. 18, *ante*, and cases there cited.

Upon the application of the public administrator to the probate court of the city and county of San Francisco, for letters of administration upon the estate of John C. Cabaniss, deceased,—opposed by a relative of deceased, praying the issuance of letters to himself; the contestant claimed that under

the last clause of this section he could come in, under the proceedings instituted by the public administrator, upon merely filing his opposition thereto at the time fixed for the hearing, without previous notice of his application as prescribed by section sixty, and that letters could be awarded to him in like manner as upon a regular application upon notice under that section; provided he could show a better title than the first applicant. The court held that letters could not be issued to a contestant of whose application the usual notice had not been given, and continued the hearing to afford time for such notice.

§ 62. On the hearing, it being first proved that notice has been given according to law, the court shall proceed to hear the allegations and proof of the parties, and to order the issuance of letters of administration as the case may require.

Hearing of application.

[Forms No. 17, 36, 37, 41, 41 A, 43 and 47, Appendix.]

§ 63. An entry in the minutes of the court that proof was made that notice had been given according to law, shall be conclusive evidence of the fact of such notice.

Minutes of court conclusive as to notice.

§ 64. Letters of administration may be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuance of letters to themselves.

Grant to any applicant.

[Forms No. 44 and 47, Appendix.]

See Sec. 73, *post*.

By the provisions of the fifty-second section, together with those of section sixty-four, it would seem clear that the public administrator is entitled to administration upon all estates not otherwise administered. *Becket et al. v. Selover*, 7 Cal. R., 215.

§ 65. Before letters of administration shall be granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate shall be proved by the oath of the applicant, and the court may also examine any other person concerning the time, place and manner of the death, and whether or not the deceased left any will; and may compel any person to attend as a witness for that purpose.

Proof of death of intestate, &c.

[Form No. 37, Appendix.]

The fact that decedent died intestate, is ordinarily shown by establishing that no will can be found. *Buckley v. Redmond*, 2 Bradford's R., 281.

Where a will was duly executed by the deceased and left in the possession of his counsel, and a few months afterwards the testator sent for it, avowing the purpose of destroying it, and a day or two subsequently stated that he

*had* destroyed it: *Held*, that, although the facts raised a presumption that the will had been destroyed by the deceased, it was proper to examine his papers for the purpose of ascertaining whether the instrument had in fact been cancelled. *Id.*

Upon an application for letters of administration, if a will be alleged, the proceeding may be stayed, to afford an opportunity to prove the will. Whether deceased died intestate must be determined by the law of the place where he was domiciled. *Isham v. Gibbons*, 1 Bradford's R., 69.

But see Sec. 27, *ante*.

Administration  
granted to sev-  
eral at request,  
etc.

§ 66. Administration may be granted to one or more competent persons, although not entitled to the same, at the request of the person entitled to be joined with such person. The request shall be in writing and shall be filed in the court.

[Form No. 44, Appendix.]

But a person not entitled, cannot be joined as administrator with one who is entitled, except with the consent of the latter. The Surrogate has no discretion for such purpose. *Peters v. Pub. Admr.*, 1 Bradford's R., 200.

Revocation of  
letters of admin-  
istration.

§ 67. When letters of administration have been granted to any other persons than the surviving husband or wife, the child, the father, mother, or the brother of the intestate, any one of them may obtain the revocation of the letters by presenting to the probate court a petition praying the revocation, and that letters of administration may be issued to him or her.

[Form No. 44, Appendix.]

Citation to ad-  
ministrator.

§ 68. When any such petition is filed, the clerk shall issue a citation to the administrator to appear and answer the petition at the next regular term of the court, or at any special term that may be appointed by the judge.

[Forms No. 45, 46, Appendix.]

Hearing of pe-  
tition for revoca-  
tion.

§ 69. At the time appointed, the citation having been duly served and returned, the court shall proceed to hear the allegations of the parties; and if the right of the applicant is established, and he or she be competent, letters of administration shall be granted to the applicant, and the letters of the former administrator be revoked.

[Forms No. 46, 47, Appendix.]

Revocation in  
other cases.

§ 70. The surviving husband or wife, where letters of administration have been granted to a child, to the father, or to a brother of the intestate, or any of such relatives when letters have been granted to any other of them, may assert

his or her prior right and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

§ 71. Letters of administration shall be signed by the clerk and be under the seal of the court, and may be in substantially the following form:—"The State of California, county of ——. C. D. is hereby appointed Administrator of the estate of A. B., deceased. [Seal.] Witness, G. H., clerk of the probate court of the county of —, with the seal of the court affixed, the — day of —, A. D. 18—. By order of the court. G. H., clerk."

Form of letters of administration.

[Form No. 48, Appendix.]

§ 72. Before letters testamentary or of administration shall be issued to the executor or administrator, he shall take and subscribe, an oath or affirmation, before the probate judge or clerk, that he will perform, according to law, the duties of executor or administrator.

Oath to be taken before letters issued.

[Forms No. 33, 34 and 58, Appendix.]

§ 73. Every person to whom letters testamentary or of administration, shall have been directed to issue, shall, before receiving the letters, execute a bond to the State of California, with two or more sufficient sureties, to be approved by the probate judge. In form, the bond shall be joint and several, and the penalty shall not be less than twice the value of the personal property belonging to the estate, which value shall be ascertained by the probate judge, by the examination on oath of the party applying, and of any other persons he may think proper to examine. *The probate judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him.* The bond shall be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. *He shall also require bond and sufficient surety for the annual rents, issues and profits, of all real estate in his charge as such executor or administrator, to be approved by the probate judge.* (a.)

Bonds to be given.

Its form.

Additional bond on sale of real estate.

Further security.

[Form No. 38, Appendix.]

See Sec. 64, ante.

(a.) Amended May 3d., 1852. See statutes of 1852, p. 105. The amendment added the portions of the section in italics. Statute 1851, p. 456; Compiled Laws, p. 385.

The party entitled may receive letters where they have been ordered to be issued to another applicant, such applicant neglecting to perfect the requisite bond. *Harrison v. McMahon*, 1 Bradford's R., 283.

See *Spencer v. Cahoon*, noted at the end of the chapter.

Separate bonds.

§ 74. When two or more persons shall be appointed executors or administrators, the probate judge shall take a separate bond from each of them.

[Form No. 38, Appendix.]

Joint administrators and co-executors, are regarded in law as one person; and consequently the acts of one, in respect to the administration, are deemed to be the acts of all, in as much as they have a joint and entire authority over the whole property. *Dean v. Duffield*, 8 Texas R., 235.

And see cases noted at the end of chapter VIII., concerning the powers and duties of executors and administrators.

Several suits on one bond.

§ 75. The bond shall not be void upon the first recovery, but may be sued upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Justification of sureties.

§ 76. In all cases where bonds are required by this act, the sureties must justify on oath, before the judge or clerk of some court having a seal, to the effect that they are householders or freeholders, resident within this State, *and worth the amount justified to*, over and above their debts and liabilities, *exclusive of property exempt from execution*; such justification shall be in writing, *signed by the person justifying*, and certified to by the judge or clerk who takes the same, and attached to and filed with the bond. Whenever the penal sum of the bond amounts to more than *two thousand* dollars, the sureties may be allowed to become liable for portions of said penal sum, making in the aggregate the whole penal sum of such bond. (a.)

To be filed, etc.

Sureties for portions.

[Form No. 38, Appendix.]

Citation to securities to appear and be examined, etc.

§ 76 A. (SEC. 3.) Before the probate judge approves any bond, required by said act, (*the probate act*) he may of his own motion, or at any time after the approval of such bond, upon the motion of any person interested in said estate, sup-

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(a.) Amended May 7, 1855. Stat. 1855, p. 299. The italics indicate the changes made by the amendment. By the statute of 1851, the sureties were required to justify in *double* the amount for which they became liable, and were allowed to become liable for *portions* of the penal sum where it amounted to more than *five thousand* dollars. See Stat. 1851, p. 456; Compiled Laws, p. 136.



ported by affidavit, that any one, or all of such securities, are not worth as much as they have justified to, order a citation to issue, requiring such security or securities to appear before him, at a particular time and place, to testify touching his or their property, and its value ; and the judge shall, at the time such citation is issued, cause a notice to be issued to the executor or administrator, and requiring his appearance at the return of said citation. Upon the return of the citation, the judge may swear the securities and such witnesses as may be produced, touching the property of such securities and its value, and if, upon such investigation, the judge is satisfied that the bond is insufficient, he may require sufficient additional security, within such time as may be reasonable, not less than five days. (a)

Notice to executor, etc.

Proof touching property of sureties.

§ 76 B. (Sec. 4.) If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate who will execute a sufficient bond, shall be appointed the administrator.

In case security not given.

§77. When it is expressly provided in the will of a testator that no bond shall be required of the executor, letters testamentary may issue without any bond having been given ; but an executor, to whom letters have been issued without bond, may, at any time afterwards, whenever it may be shown from any cause to be necessary or proper, be required to appear and file a bond as in other cases.

When bond may be dispensed with.

[Form No. 21, Appendix.]

§78. Whenever any person interested in any estate shall discover that the sureties of any executor or administrator, have become, or are becoming insolvent, that they have removed or are about to remove from the state, or that from any other cause, the bond is insufficient, he may apply by petition to the probate judge, and require that further security be given.

Application for further security.

[Form No. 49, Appendix.]

Compare secs. 82, 83, *post*, and see *ante*, sec. 18, and cases there cited.

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(a) This, together with the following section, are the 3d and 4th sections of the act of May 7, 1855, amending section 76, (stat. 1855, p. 299.) They are inserted here, and designated as above, for convenience of reference.

Any person interested in the estate of a testator, may apply for an order to show cause why the executor should not be superseded on the ground that his circumstances are so precarious as not to afford adequate security for the due administration of the estate. An apparent interest positively sworn to, will authorize the application, and the validity of the claim will not be tried on such application. *Cotterell v. Brook*, 1 Bradford's R. 148.

Citation to show  
cause against  
such application.

§ 79. If the probate judge shall be satisfied that the matter requires investigation, a citation shall be issued to the executor or administrator, requiring him to appear at a time and place to be therein specified, to show cause why he should not give further security. The citation shall be served personally on the executor or administrator, at least five days before the return day. If he shall have absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence.

[Forms No. 50 and 51, Appendix.]

Further secu-  
rity may be or-  
dered.

§ 80. On the return of the citation or at such other time as the judge shall appoint, he shall proceed to hear the proofs and allegations of the parties. If it shall satisfactorily appear that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form within a reasonable time, not exceeding five days.

[Forms No. 51 and 52, Appendix.]

§ 81. If the executor or administrator, neglect to comply with the order within the time prescribed, the judge shall, by order, revoke his letters, and his authority shall thereupon cease.

[Form No. 53, Appendix.]

See *post* Sec. 283.

Powers of exe-  
cutor to be sus-  
pended, etc.

§ 82. When a petition is presented praying that an executor or administrator be required to give further security, and when it shall also be alleged, on oath or affirmation, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

[Form No. 50, Appendix.]

Compare Sec. 281, *post*.

§ 83. When it shall come to his knowledge that the bond of any executor or administrator is from any cause insuffi-

cient, it shall be the duty of the probate judge, without any application, to cause him to be cited to appear and show cause why he should not give further security, and to proceed thereon as upon the application of any person interested.

Judge to require further security without application.

§ 84. When either or all of the sureties of any executor or administrator shall desire to be released from responsibility, on account of his future acts, they may make application to the probate judge for relief, and the judge shall cause a citation, to the executor or administrator, to be issued and served, requiring him to appear, at a time and place to be therein specified, and to give other security.

Sureties wishing to be released.

[Forms No. 54 to 56. See also No. 51, Appendix.]

§ 85. If new sureties be given to the satisfaction of the judge, he may, thereupon, make an order that the surety or securities who applied for relief, shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.

New sureties.

[Form No. 54, Appendix.]

§ 86. If the executor or administrator neglect or refuse to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, not exceeding five days, he shall by order revoke the letters granted.

Letters to be revoked if new sureties not given.

[Forms No. 55 and 56, Appendix.]

§ 87. The applications authorized by the nine preceding sections of this chapter, may be heard and determined out of term time. All orders made therein, shall be entered upon the minutes of the court.

Application may be made out of term.

§ 88. When there shall be a delay in granting letters testamentary or of administration, from any cause, *or when such letters shall have been granted irregularly, or no sufficient bond shall have been filed as required by law, or when no application shall have been made for such letters*, the probate judge shall appoint a special administrator to collect and take charge of the estate of the deceased, *in whatever county or counties the same may be found*, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate. (a.)

Special administrator.

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(a.) Amended April 23, 1855. The amendment added the portions of the sec-

[Form No. 57, Appendix.]

By the eighty-eighth section, which has reference to *special administration*, the court is authorized to "direct the public administrator to take charge of the estate." The phrase "take charge of the estate," is qualified by the scope of the section, and only means to give the public administrator the same powers over the particular estate as he would have over the class of estates referred to in the 14th chapter. *Beckett v. Selover*, 7 Cal. R., 215.

An appointment of an administrator *pro tem.* which does not conform to the statute, may be treated as a nullity. *Alexander v. Barfield*, 6 Texas R., 400.

Order must specify powers granted.

§ 89. The appointment may be made, out of term time, and without notice, and shall be made by entry upon the minutes of the court, which shall specify the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk shall issue letters of administration to such person, in conformity with the order.

[Form No. 57 and 58, Appendix.]

Who to be appointed. No appeal from appointment.

§ 90. In making the appointment of a special administrator, the probate judge shall give preference to the person or persons entitled to letters testamentary or of administration. But no appeal shall be allowed from the appointment.

See *ante* Sec. 52, and cases cited.

Bond to be given.

§ 91. Before any letters shall issue to any special administrator, he shall give bond in such sum as the probate judge may direct, with sureties to the satisfaction of said judge, conditioned for the faithful performance of his duties.

[Form No. 38, Appendix.]

Duties of special administrator.

§ 92. The special administrator shall collect and preserve for the executor or administrator, all the goods, chattels and debts of the deceased, and for that purpose may commence and maintain suits as an administrator. He may sell such perishable property as the probate court may order to be sold, and may exercise such other powers as may have been conferred upon him by his appointment; but in no case shall he be liable to an action by any creditor on a claim against the deceased.

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tion in italics, substituting "shall" appoint for "may" appoint, and omitting the words "if there be one," which came after "public administrator" in the statute of 1851. Statutes of 1853, p. 383; Statutes of 1851, p. 468; Compiled Laws, p. 388. Amended section, Statutes of 1855, p. 133, § 4.

In regard to actions by and against executors, etc., see *post* sections, 195 to 200, inclusive, and cases noted at the end of chapter VIII.

§ 93. When letters testamentary or of administration, on the estate of the deceased have been granted, the powers of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator, all the property and effects of the deceased in his hands; and the executor or administrator may be permitted to prosecute to final judgment, any suit commenced by the special administrator.

When his powers to cease.

§ 94. The special administrator shall also render an account, on oath, of his proceedings, in like manner as other administrators are required to do.

To account on oath.

In reference to accounts to be rendered by administrators, etc., see *post* chapter X.

§ 95. Whenever an executor or administrator shall die, or his letters be revoked, and the circumstances of the estate require the immediate appointment of an administrator, the probate judge may appoint a special administrator as provided in the preceding sections.

Special administrator in other cases.

§ 96. In case any one of several executors or administrators, to whom letters shall have been granted, shall die, become lunatic, be convicted of an infamous offence, or otherwise become incapable of executing the trust, or in case the letters testamentary or of administration, shall be revoked or annulled according to law, with respect to any one executor or administrator, the remaining executor or administrator shall proceed and complete the execution of the will or administration.

In case of one or more, of several executors becoming incompetent to act.

§ 97. If all such executors or administrators shall die or become incapable, or the power and authority of all of them shall be revoked according to law, the probate court shall issue letters of administration with the will annexed, or otherwise, to the widow or next of kin, or others, in the same manner as is directed in relation to original letters of administration. The administrators so appointed, shall give bond in the like penalty, with like sureties and conditions as hereinbefore required of administrators, and shall have the like power and authority.

If all become incompetent to act.

[Forms No. 32, 23, 42, 43 and 38, Appendix.]

§ 98. If, after granting letters of administration on the

ground of intestacy, a will of the deceased shall be duly proved and allowed by the court, the letters of administration shall be revoked, and the power of the administrator shall cease, and he shall render an account of his administration within such time as the court shall direct.

If will proved after grant of letters of administration.

[Form No. 59, Appendix.]

On application by one of the next of kin for a revocation of letters of administration on the ground that deceased left a will, and it being proved that a will had been executed: *Held*, that in the absence of proof that the will was in the possession of deceased, or unrevoked, at the time of his death, it was improper to revoke the letters. *Holland v. Ferris*. 2 Bradford's R., 513.

§ 99. In such case, the executor of the will, or the administrator with the will annexed, shall be entitled to demand, sue for and collect, all the rights, goods, chattels and effects of the deceased remaining unadministered, and may be admitted to prosecute to final judgment, any suit commenced by the administrator before the revocation of his letters of administration.

Powers of executor in such a case.

§ 100. Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to such person as the court shall appoint; *Provided*, if, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested in the estate, shall in the opinion of the court require it, the court may, at any time before such settlement of accounts and delivering up of the estate shall have been completed, revoke the powers, or the letters testamentary or of administration of such executor or administrator, and appoint in his stead, an administrator, either special or general as the case may require, and in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected, by such appointment of a special or general administrator in his stead. (a.)

Executor or administrator may resign.

Court may revoke letters, etc.

[Form No. 139, Appendix.]

See Sec. 222, *post*.

(a.) Amended March 30, 1858. See Statutes 1858, p. 105. The amendment adds all that portion of the present section from the word "provided," to the end.

An administrator cannot resign by permission of the probate court, without first settling up his accounts and delivering over the estate to his successor appointed by the court. The permission given in one case by the 100th section of the statute, is a negative upon the right in others. *Haynes v. Meeks*, July term, 1857.

Same case, after re-argument, January term, 1858.

Though the probate court has no right to accept the resignation of an administrator until he has settled his administration accounts, such an acceptance of his resignation is only a voidable error, and not void. *Ib*, January term, 1858.

The acceptance by the probate court of the resignation of an administrator, is sufficiently established by the appointment of his successor. *Ib*.

Where an administrator resigns, or is removed, leaving the administration incomplete, there is no fixed rule of compensation. The probate court should apportion it, in reference to the compensation fixed by law for the whole, according to sound judgment. *Ord v. Little*, 3 Cal. R., 287.

§ 101. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, shall be as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust. Acts of executor valid until his power is revoked.

§ 102. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him, and have not been revoked, shall have the same effect in evidence as the letters themselves. Transcript from minutes to be evidence.

§ 103. No probate judge shall admit to probate, any will, or grant letters testamentary or of administration, in any case where he shall be interested as next of kin to the deceased, or as a legatee or devisee under the will, or where he shall be named as executor or trustee in the will, or shall be a witness thereto. When probate judge not to act.

§ 104. When any probate judge, who would otherwise be authorized to act, shall be precluded from acting from the causes mentioned in the preceding section, or when he shall be in any manner interested, upon a representation and due proof thereof to the probate judge of an adjoining county, such judge shall be vested with all the powers and authority of the proper probate judge, in relation to the proof of any will and the granting of letters testamentary or of adminis- In such case probate judge of adjoining county to act.

tration thereon, and the granting of letters of administration in cases of intestacy, and shall retain jurisdiction as to all subsequent proceedings in regard to the estate.

*Cases not noted under the preceding Sections of Chapter III.*

Letters of administration are but *evidences* of authority, and the administrator may act without them if the records of the court show his appointment. *Hosey v. Brasher*, 8 Port. Ala. R., 559.

Letters of *general administration* granted pending a contest respecting the probate of a will, are *void*; and cannot be supported as a grant of administration, *pendente lite*. *Slade v. Washburn*, 3 Iredell's N. C. R., 557.

Where A. B. was appointed administrator, and qualified as such, though a *blank bond was signed by him and his surities*, his acts were held valid until his letters were revoked. *Spencer v. Cahoon*, 4 Dev. N. C. R., 225.

A surety on an administration bond, does not, before an accounting is had, stand in a fiduciary relation to the creditors of the intestate, and is not chargeable with any primary responsibility as to the management of the estate. And one of the sureties of an administratrix having purchased claims against the intestate at three shillings on the dollar, and there being no proof of connivance between him and the administratrix, or that the money of the estate had been used in buying the claims, the purchases were held to be valid. *Halsted v. Hyman*, 3 Bradford's R., 426.

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## CHAPTER IV.

### THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEASED PERSONS. (a.)

§ 105. Every executor or administrator, shall make and return to the court, at its first term after his appointment, a true inventory and appraisalment of all the estate of the deceased which shall have come to his possession or knowledge,  
[Form No. 61, Appendix.]

Inventory to be made.

See cases noted under section 107.

The Surrogate can of his own motion, enforce the return of an inventory, though it is not usual to require the exhibition of an inventory or account, unless at the intervention of a party in interest; but the mere appearance of interest is sufficient. *Thomson v. Thomson*, 1 Bradford's R., 24.

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(a.) Some authorities bearing upon the general subject of this chapter, and not noted under particular sections, will be found at the end of the chapter.



§ 106. For the purpose of making the appraisement, the probate judge shall appoint three disinterested persons, any two of whom may act, and who shall be entitled to receive a reasonable compensation for their services, to be allowed by the court; their compensation, as allowed, shall be in the form of a bill of items of their services, which shall be sworn to by them and filed with the inventory, and which shall not exceed five dollars per day. If any part of the estate shall be in any other county than that in which letters issued, appraisers thereof may be appointed, either by the probate judge having jurisdiction of the case, or by the probate judge of such county.

Appraisers to be appointed. Their compensation.

When part of the estate in another county.

[Forms No. 60, 61, Appendix.]

See cases under next section.

§ 107. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, shall take and subscribe an oath, to be attached to the inventory, that they will truly, honestly and impartially, appraise the property which shall be exhibited to them, according to the best of their knowledge and ability. They shall then proceed to estimate and appraise the property, and shall set down each article separately, with the value thereof in dollars and cents, in figures opposite to the articles respectively. The inventory shall contain all the estate of the deceased, real and personal, a statement of all debts, partnerships and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the deceased, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates and the sum, which in the judgment of the appraiser may be collectable on each debt, interest or security.

Appraiser's Oath.

Appraisement, how made.

Inventory, what to contain.

[Form No. 61, Appendix.]

See cases cited at the end of the Chapter.

The appraisers are officers appointed by the Surrogate, and their appraisement may be reviewed and corrected. It is not conclusive. If they make a valuation palpably erroneous, the Surrogate may direct the error to be rectified. *Ames v. Downing*, 1 Bradford's R., 321; *Appleton v. Cameron*, 2 Bradford's R., 119.

So, if in taking the inventory, the property directed by statute to be set apart for minor children was not so apportioned, the error may be corrected. *Ib.*, and *Clayton v. Wardell*, 2 Bradford's R., p. 1.

It is only the interest of a deceased partner in the *surplus* after the pay-

ment of the partnership debts, which is assets in the hands of the administrator. It is accordingly, sufficient to note the interest of the deceased in the partnership generally upon the inventory. *Thomson v. Thomson*, 1 Bradford's R., 24.

See *Montgomery v. Dunning*, noted at the end of the chapter.

Upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory and account, is with the party objecting; and it must be established with reasonable certainty, and not left to mere conjecture or suspicion. *Marre v. Ginochio*, 2 Bradford's R., p. 165.

§ 108. The inventory shall also contain an account of all moneys belonging to the deceased which shall have come to the hands of the executor or administrator, and if none shall have come to his hands, the fact shall be so stated in the inventory.

[Form No. 61, Appendix.]

§ 109. The naming any person executor in a will, shall not operate as a discharge of any just claim which the testator had against the executor, but the claim shall be included in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due.

§ 110. The discharge or bequest in a will of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid against the creditors of the deceased, but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory, and shall, if necessary, be applied in the payment of his debts. If not necessary for that purpose, it shall be paid in the same manner and proportion as other specific legacies.

§ 111. The inventory shall be signed by the appraisers, and the executor or administrator shall take and subscribe an oath, before the probate judge or the clerk of the court, that the inventory contains a true statement of all the estate of the deceased which has come to his knowledge and possession, and particularly of all money belonging to the deceased, and of all just claims of the deceased against the executor or administrator. The oath shall be indorsed upon or annexed to the inventory.

[Form No. 61, Appendix.]

§ 112. If any executor or administrator shall neglect or refuse to return the inventory within the time prescribed, or

within such further time, not exceeding two months, as the court shall for reasonable cause allow, the court shall revoke the letters testamentary or of administration, and the executor or administrator shall be liable on his bond for any injury sustained by the estate by his neglect.

[Forms No. 62, 63, Appendix.]

§ 113. Whenever property not mentioned in any inventory that shall have been made, shall come to the possession or <sup>Further inven-</sup> knowledge of an executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an inventory to be returned within two months after the discovery thereof; and the making of such inventory may be enforced after notice, by attachment or removal from office.

See sections 105 and 107, *supra*.

§ 114. The executor or administrator, shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate, until the estate shall be settled, or until delivered over by order of the probate court to the heirs or devisees, and shall keep in good tenantable repair, all houses, buildings, and fences thereon, which are under his control. <sup>Executor, etc.,  
to have possession of property.</sup>

Compare Sec. 194 and cases noted.

§ 115. The personal estate of the deceased which shall come into the hands of the executor or administrator, shall be first chargeable with the payment of the debts and expenses; and if the goods, chattels, rights and credits in the hands of the executor or administrator, shall not be sufficient to pay the debts of deceased and the expenses of administration, and the allowances to the family of the deceased, the whole of the real estate may be sold for that purpose, by the executor or administrator, in the manner prescribed by this act. <sup>If personal estate insufficient to pay debts.</sup>

See *post* chapter VII., in regard to sales of property by executors, etc.

§ 116. If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects, of any deceased person, he shall stand chargeable and be liable to the action of the executor or administrator of the estate, for double <sup>Action by executor for property embezzled, etc.</sup>

the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

§ 117. If any executor or administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, shall complain to the probate judge, on oath, that any person is suspected to have concealed, embezzled, conveyed away, or disposed of, any moneys, goods, or chattels of the deceased ; or that he has in his possession or knowledge, any deeds or conveyances, bonds, contracts, or other writings, which contain evidences of, or tend to disclose the right, title, interest or claim of the deceased, to any real or personal estate ; or any claim or demand, or any last will of the deceased, the said judge may cite such person to appear before the probate court, and may examine him on oath, upon the matter of such complaint. If such person be not in the county where letters have been granted, he may be cited and examined either before the probate court of the county where he may be found, or before the court issuing the order or citation. But, if in the latter case he appear and be found innocent, his necessary expenses shall be allowed him out of the estate.

Citations to person charged with having converted property of dec'd etc.

Person cited may be examined on oath.

Where cited and examined.

Expenses allowed if innocent.

[Form No. 64, Appendix.]

In reference to the power of the probate court to compel the production of papers, property, etc., see section 63 of the Judicial Act, at page 17, *ante*.

§ 118. If the person so cited, refuse to appear and submit to such examination, or to answer such interrogatories as may be put to him, touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he shall submit to the order of the court ; and all such interrogatories and answers shall be in writing, and shall be signed by the party examined and filed in the probate court.

Obedience, how enforced.

[Forms No. 65, 66, Appendix.]

§ 119. The probate judge, upon the complaint on oath, of any executor or administrator, may cite any person who shall have been intrusted by such executor or administrator with any part of the estate of the deceased person, to appear before such court, and may require such person to render a full account on oath, of any moneys, goods, chattels, bonds, accounts, or other papers belonging to the estate which shall have come to his possession in trust for the ex-

Citation to person entrusted by executor, etc. with property of estate.

ecutor or administrator, and of his proceedings thereon ; and if the person so cited shall refuse to appear and render such account, the court may proceed against him, as provided in the preceding section.

[Forms No. 64 to 66, Appendix.]

Under a section of the Texas Probate Act, (article 1,228, of Hartley's Texas Digest,) the chief justice is authorized, upon complaint filed, to cause any person (including previous administrators) to appear before him and deliver up any papers, evidences of debt, &c., which he may have in his possession belonging to an estate, or show cause to the contrary.

It was held that this section did not empower the court to require an administrator who had been removed, to surrender his vouchers, or any papers necessary to his own defence. *Miller v. Jasper*, 10 Texas R., 513.

*Cases not Noted under the Sections of the preceding Division of the Statute. (a.)*

A probate judge ought not to reject an inventory exhibited by an executor or administrator, because it contains property, the title to which is disputed. *Gold's case*, Kirby's Conn. R., 100.

Executors and administrators are bound to inventory and account for *provisions* belonging to deceased at the time of his death. *Griswold v. Chandler*, 5 New Hampshire R., 492.

Appraisers are officers appointed to estimate and appraise ; but their appraisalment is not conclusive. It may be reviewed, examined and corrected. *Appleton v. Cameron*, 2 Bradford's R., 119.

If they neglect to set apart property for the widow or minor children, or make a valuation palpably erroneous, the Surrogate may direct the error to be rectified. *Ib.*

The valuation made by the appraisers in the inventory, is not conclusive against the executor or administrator, but may be shown to have been erroneous. *Ames v. Downing*, 1 Bradford's R., 321.

It may be shown on the accounting of the administrator or executor, that the assets were not correctly stated in the inventory. *Montgomery v. Dunning*, 2 Bradford's R., 220.

The rule that the inventory cannot be impeached or reformed, relates to proceedings in relation to the inventory itself. But it may be shown, *on the accounting*, that the assets were not correctly stated in the inventory. *Ib.*

In the ecclesiastical courts, an inventory cannot be falsified ; and if allegations pleading *omissa* are entertained, yet if the allegations are denied in the answer, evidence will not be received against the answer. If the answer confesses more assets, the inventory may be amended. *Thomson v. Thomson*, 1 Bradford's R., 24.

The administrator of a surviving partner, stands in the same position as the surviving partner in his life time, and although he has the legal title to the partnership effects, yet they are assets of the firm, and not of his intestate, and should neither be inventoried nor accounted for as property of his intestate. *Ib.*

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(a.) See also the cases under chapter X., respecting accounting by executors, etc.

It is only the interest of the deceased partner in *the surplus after the payment of the partnership debts* which is assets in the hands of his administrator. It is not usual, therefore, to make a specific inventory of copartnership assets, but it is deemed sufficient to *note the interest of the deceased in the partnership, generally upon the inventory.* *Ib.*

If, on taking the inventory, the property directed by statute to be set apart for minor children was not so apportioned, the error may be corrected on the accounting. *Clayton v. Wardell*, 2 Bradford's R., p. 1.

The provisions of the statute directing certain articles to be set aside in the inventory for the benefit of the widow and minor children of the deceased, are not limited to cases where the deceased was a resident of this State. These articles are not assets—do not belong to the executor or administrator, and are not the subject of administration or distribution. *Kip v. Pub. Admr.*, 2 Bradford's R., 258.

Lands descended in *another State*, cannot be considered as assets. *Austin v. Gage*, 9 Mass., R. 395.

The right of enjoyment of possession of public lands, may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Grover v. Hawley*, 5 Cal. R., 485.

A note and mortgage made to a husband and wife, goes to her in case she survives, and not to the administrator as assets. *Draper v. Jackson*, 16 Mass., 480.

Specific personal property held by deceased in trust, is not assets in the executors hands, but is held by him as his testator held it; *otherwise, if the property have no ear-mark, in which case the person entitled must come in as a general creditor.* *Johnson v. Ames*, 11, Pickering, 173.

The administrator should inventory property belonging to the estate, though in the hands of a stranger. *Potter v. Titcomb*, 1 Fairf., 53.

And if there are promissory notes belonging to the estate, made by the administrator, deposited in the hands of a third person, he must inventory them, though he denies them to be due the estate. *Ib.*

## CHAPTER V.

### PROVISION FOR THE SUPPORT OF THE FAMILY.

§ 120. When a person shall die, leaving a widow or a minor child or children, the widow, child or children, shall, <sup>Provision for widow and minor children,</sup> until letters have been granted and the inventory has been returned, be entitled to remain in possession of the homestead, and of all the wearing apparel of the family and of all the household furniture of the deceased, and shall also be entitled to a reasonable provision for their support, to be allowed by the probate judge.

[Forms No. 67, and 68, Appendix.]

§ 121. Upon the return of the inventory, the court shall set apart for the use of the widow, or minor child or children, all property which is by law exempt from execution, <sup>Property set apart.</sup> or so much of such property as may have belonged to the deceased.

[Forms No. 69 and 72, Appendix.]

See Sec. 124, *infra*, and note to that section, and cases cited.

§ 122. If the whole property exempt by law be not included in the inventory, and if the amount set apart be insufficient for the support of the widow and child or children, the probate court shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, shall not be longer than one year after granting letters of administration. <sup>If property set apart be insufficient.</sup> <sup>Insolvent estate to be settled within one year.</sup>

[Forms No. 69, 70, 72 and 73, Appendix.]

§ 123. Any allowance made by the court, in accordance with the provisions of the preceding section, shall be paid by the administrator in preference to all other charges, except funeral charges and expenses of administration. <sup>Preference of allowance.</sup>

[Forms No. 69, 70, 72 and 73, Appendix.]

§ 124. If there is no law in force exempting property from execution, the following shall be set apart for the use of the widow, or minor child or children, and shall not be subject to administration : 1st., all spinning wheels, weaving looms, and stoves put up or kept for use ; 2d., the family bible; family pictures, and school books and library, not exceeding in value two hundred dollars ; 3d., all sheep, to the number of twenty, with their fleeces, and the yarn or cloth manufactured from the same ; two cows, five swine, with the necessary food for them for six months ; 4th., all wearing apparel of the widow and children, and all household goods, furniture and utensils, not exceeding in value seven hundred and fifty dollars ; 5th., the homestead, consisting of any quantity of land not exceeding twenty acres, and the dwelling house thereon, with its appurtenances, not being included in any incorporated town or city ; or instead thereof, a quantity of land, not exceeding one lot, in any incorporated town or city, and the dwelling house thereon, and its appurtenances, to be selected by the widow ; or if there be no widow, to be designated by the probate judge, and not to exceed in any case, more than five thousand dollars in value.

Property to be set apart for widow, etc.

The homestead.

[Forms No. 69 and 73; Appendix.]

See section 121, *ante*; also section 219 of the Practice Act, and sections 1 and 10 of the Homestead Act.

It would seem that it is under these latter provisions, and not under section 124, that the probate court now acts in setting apart property for the use of the widow or minor child, etc. (a.)

A widow who has once applied to the probate court to have the last resi-

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(a.) Sec. 219 of the Practice Act, passed April 29, 1851, as amended May 15, 1854, provides for the exemption of certain property from execution. Compiled Laws, p. 559; Amended section Statutes of 1854, p. 62; Wood's Digest, p. 195.

Sections 1 and 10 of the Homestead Act, passed April 21, 1851, (Compiled Laws, p. 850; Wood's Digest, pp. 483, 484,) provide as follows:

§ 1. The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution, or on any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this State.

§ 10. The homestead and other property exempt from forced sale, upon the death of the head of the family, shall be set apart by the probate court for the benefit of the surviving wife and his own legitimate children; and in case of no surviving wife or his own legitimate children, for the next heirs at law; *provided*, that the exemption as provided in this section, shall not extend to unmarried persons, except when they have charge of minor brothers or sisters, or both, or brothers' or sisters' minor children, or a mother or unmarried sisters living in the house with them.



dence of her husband and herself set aside as a homestead, and has acquiesced for eighteen months in the order so setting it aside, is concluded by her own acts, from afterward claiming a lot on which they formerly resided, merely because she has ascertained that there are liens on the lot first set aside. *Holden v. Pinney*, 6 Cal. R., 234.

As to whether buildings used for hotels, stores, etc., are susceptible of dedication to homestead purposes. *Quære. Geary v. Eastbrook*, 6 Cal. R., 457.

A husband and wife may, by joining in a conveyance of an undivided portion of premises in which a homestead right is acquired, destroy its character as a homestead. *Kellersberger v. Kopp*, 6 Cal. R., 563.

The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Cook v. Klink*, 7 Cal. R., Oct. term; *Revalk v. Kramer*, 7 Cal. R., July term, and see *Von Reynegam v. Kramer*, 7 Cal. R., July term.

§ 125. When property shall have been set apart for the use of the family in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor child, such property shall be the property of the widow. If he shall have left also a minor child or children, the one-half of such property shall belong to the widow and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow, the whole shall belong to the minor child or children.

To whom the property set apart to belong.

[Forms No. 69, 71 and 72, Appendix.]

See Sec. 127, *post*.

§ 126. If, on the return of the inventory of any intestate estate, it shall appear that the value of the whole estate does not exceed the sum of five hundred dollars, the probate court shall, by a decree for that purpose, assign for the use and support of the widow and minor children of the intestate, or for the support of the minor child or children, if there be no widow, the whole of the estate, after the payment of the funeral charges and expenses of the administration, and there shall be no further proceedings in the administration unless further estate be discovered.

Where whole estate does not exceed \$500.

[Form No. 71, Appendix.]

§ 127. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the one hundred and twenty-fifth and one hundred and twenty-sixth [124th and 125th ?] sections of this act, the whole property so set apart shall go to the minor child or children.

In case widow has maintenance.

[Form No. 71, Appendix.]

## CHAPTER VI.

### OF CLAIMS AGAINST THE ESTATE.

§ 128. Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper, printed in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit them with the necessary vouchers, within ten months after the date of the notice, to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice. Such notice shall be published as often as the judge may deem necessary, but not less than once a week for four weeks.

Notice to creditors.

Claims to be presented within ten months.

Notice, how long.

[Form No. 74, 75, Appendix.]

§ 129. After the notice shall have been published, a copy thereof, together with an affidavit attached thereto, of the publisher or printer of the paper in which the same was published, shall be filed by the executor or administrator.

Copy, with affidavit, etc., to be filed.

[Form No. 75, Appendix.]

§ 130. If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; *provided*, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute.

When barred.

Compare sec. 246.

A claim not presented to the administrator within the time allowed, is barred, not only as against him, but as against heirs, and all other creditors of the estate. *Graham v. Vining*, 2 Texas R., 433.

§ 131. Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the

To be supported by affidavit, etc.

claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim. Vouchers.

[Forms No. 76, 77, Appendix and *see errata*—form No. 77.]

§ 131. A. (Sec. 1.) Any probate judge may present a claim against the estate of any deceased person for allowance, to the executor or administrator of such estate; and if the executor or administrator allows such claim, he shall in writing, designate some probate judge of an adjoining county; and the probate judge so designated by the executor or administrator, shall, upon the presentation of such claim to him, have the same power to allow or reject it, as he would have, if the will had been proved, or administration granted in his own county; and the probate judge presenting such claim, shall, in case of its rejection by the executor or administrator, or by such probate judge, as shall have acted upon it, have the same right to sue in a proper court for its recovery, as other persons have, when their claims against an estate are rejected. (a.) Claim against estate by probate judge.

§ 132. When a claim, accompanied by the affidavit required in the preceding section, has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection, with the day and date thereof. If he allow this claim, it shall be presented to the probate judge for his approval, who shall in the same manner indorse upon it his allowance or rejection. Allowance or rejection to be endorsed, etc.

[Form No. 76, 77, Appendix.]

If an administrator indorse on a claim his *reasons* for rejecting it, he will not be permitted to plead, or urge in abatement of the suit, any other reason, which goes merely to the sufficiency of the presentation for allowance. *Hansell vs. Gregg*, 7 Texas R. p. 223.

§ 133. Every claim which has been allowed by the executor, shall be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. Effect of allowance, etc.

See Sec. 158, and cases noted.

The words "and approved by the probate judge," have probably been omitted by inadvertence, after the word "administrator," in the last section.

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(a.) Section 1 of act of April 14, 1856, (stat. 1856, p. 93.) Inserted here, and noted § 131 A, for convenience of reference.

By our probate law, claims against an estate which have been allowed by the administrator and the probate judge, have the force and effect of judgments; and it is error in the probate court to reject on the final settlement of the administrator's accounts, sums paid by him on claims so allowed. *Deck's Estate v. Gherke*, 6 Cal. R., 666. But this rule applies only to such claims *as are debts against the estate, and not to expenses incurred, or disbursements made by the administrator*, the policy of the law being merely to prevent estates from being squandered in useless litigation. *Ib.*

There is no doubt, but that the allowance and approval of the claim is a *quasi* judgment, binding *as between the actual parties*. But *the heirs* of the deceased have a right to go behind the allowance and approval, and to require proof of the original indebtedness, after petition and notice for the sale of real estate to pay debts.

And on the hearing of such petition, it is error in the probate judge to refuse to hear testimony that the deceased did not die in the county where the estate is being administered; and also to refuse to allow the heirs to question the justice of the claims allowed. *Beckett et. al. v. Selover*, January term, 1857, where the effect of the allowance and approval of the claim is considered at length, and cases from the Texas Reports cited.

§ 134. When a claim is rejected, either by the executor or administrator, or the probate judge, the holder shall bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within three months after it becomes due, otherwise the claim shall be forever barred.

Action upon claim when rejected.

§ 135. No claim shall be allowed by the executor or administrator, or by the probate judge, which is barred by the statute of limitations.

Claim barred by Stat. Lim.

[Form No. 77, Appendix.]

*It seems* that the presentation to the administrator is *the commencement of a suit upon it*, and stops the running of the statute. *Beckett v. Selover*, 7 Cal. R. p. 215.

§ 136. No holder of any claim against an estate, shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator.

Action not maintainable till claim presented.

As to actions against administrators etc., see sec. 195, and cases noted.

Mortgages, and liens of record, form no exception to the rule prescribed by sec. 136. The claims secured by them must have been presented to the executor or administrator, and rejected by him before an action can be maintained on them. *Ellisen v. Halleck*, 6 Cal. 386, and see *Harwood v. Marye et. al.* Oct. term, 1857.

§ 137. The time during which there shall be a vacancy in the administration, shall not be included in any limitations herein prescribed.

Vacancy in administration.

§ 138. If an action be pending against the testator or intestate at the time of his death, the plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action, unless proof be made of the presentment.

If action pending at testator's death.

[Forms No. 76 and 77, Appendix.]

§ 139. Whenever any claim shall be presented to any executor or administrator, or to the probate judge, and he shall be willing to allow the same in part, he shall state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed, in satisfaction of his claim, he shall recover no costs in any action which he may bring against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed.

Claim allowed in part.

Refusal to accept.

[Form No. 77, Appendix.]

See *Hansell v. Gregg*, noted under section 132.

§ 140. The effect of any judgment rendered against any executor or administrator, upon any claim for money against the estate of his testator or intestate, shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator, and the probate judge; and the judgment shall be that the executor or administrator pay in due course of administration, the amount ascertained to be due. A certified transcript of the judgment shall be filed in the probate court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

Effect of judgment against executor, etc.

Compare Sec. 133, *ante*, and cases noted.

§ 141. When any judgment has been rendered against the testator or intestate, in his lifetime, no execution shall issue thereon after his death; but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant; and if justly due and unsatisfied, shall be paid in due course of administration; *provided, however*, that if the execution shall have been actually levied upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer

When judgment has been rendered against testator, etc., in his lifetime.

making the sale, shall account to the executor or administrator, for any surplus in his hands.

§ 142. If the executor or administrator doubt the correctness of any claim presented to him, he may enter into an agreement in writing with the claimant, to refer the matter in controversy to some disinterested person to be approved by the probate judge. Upon filing the agreement and approval of the probate judge, in the office of the clerk of the district court for the county in which the letters testamentary or of administration were granted, the clerk shall, either in vacation or in term, enter a rule referring the matter in controversy to the person so selected.

[Forms No. 78, 79, Appendix.]

§ 143. The referee shall thereupon proceed to hear and determine the matter, and make his report thereon to the court in which the rule for his appointment shall have been entered. The same proceedings shall be had in all respects; the referee shall have the same powers—be entitled to the same compensation, and subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference. The court may set aside the referee or appoint another in his place, or may set aside or confirm the report, and adjudge costs, as in actions against executors and administrators, and the judgment of the court thereon shall be valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

§ 144. When a judgment has been recovered, with costs, against any executor or administrator, the executor or administrator shall be individually liable for the costs, but they shall be allowed him in his administration accounts, unless it shall appear that the suit or proceeding in which the costs were taxed shall have been prosecuted or resisted without just cause.

Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been prosecuted or resisted without just cause. The provisions of the 144th section of the Probate Act, are not limited to settlements in the probate court. *Hicox v. Graham*, 6 Cal. R., 667.

§ 145. If the executor or administrator, is himself a

creditor of the testator or intestate, his claim, duly authenticated by affidavits, shall be presented for allowance or rejection to the probate judge, and its allowance by the judge shall be sufficient evidence of its correctness.

Claim by executor against estate.

§ 146. If any executor or administrator shall neglect for two months after his appointment, to give notice to creditors as prescribed in this chapter, it shall be the duty of the court to revoke his letters.

Neglect to give notice to creditors.

[Form No. 80, Appendix.]

§ 147. At the same term at which he is required to return his inventory, the executor or administrator shall also return a statement of all claims against the estate which shall have been presented to him, when required by the court; and from term to term thereafter, shall present a statement of claims subsequently presented to him. In all such statements he shall designate the names of the creditors,—the nature of each claim,—when it became due, or will become due—and whether it was allowed or rejected by him.

Executor, etc., to return a statement of claims.

*Cases bearing upon the General Subjects of Chapter VI.*

Where an administrator verbally admits a claim to be good, and thereby induces a third person to take it, he will be estopped from interposing a defence against it in the hands of a third person. *Swenson v. Walker*, 3 Texas R., 93.

The claim of an executor or administrator against the deceased, has no priority over the demands of other creditors, and he cannot retain assets of the estate in payment of his own demand until it has been proved and allowed by the Surrogate. *Treat v. Fortune*, 2 Bradford's R., 116.

The advertisement for claims, protects the executor in case of distribution after the advertisement has expired. *Clayton v. Wardell*, 2 Bradford's R., 1.

The object of the presentation of the claim to the administrator is to afford him an opportunity to admit it, if just, and settle it in due course of administration. It is enough that it be so presented as to inform the administrator of the nature of the claim. *Trigg v. Moore*, 10 Texas R., 197.

Where no objection is taken to the want of certainty in the presentation of a claim to an administrator, either in the rejection of the claim or in the answer in the court below, such objection cannot be raised in the supreme court, not even in support of the judgment of the court below. *Ib.*

See *Hansell v. Gregg*, noted under section 132.

Although a claim be an open account, it bears interest from the date of its approval; the allowance and approval are a judgment. *Finley v. Carothers*, 9 Texas R., 517.

The presentation to, and rejection by, one of several administrators, is sufficient to authorize an action upon it. *Dean v. Duffield*, 8 Texas R., 225.

The approval or disapproval of the probate judge, should be indorsed in writing upon the claim. Where not so indorsed, the *prima facie* presump-

tion is that it does not exist. As to whether in any case it might be proved by evidence *aliunde—quaere*. *Danzey v. Swinney*, 7 Texas R., 617.

Proceedings in the probate court cannot be taken by a creditor whose claim has not been allowed and approved; and, *it seems*, a proceeding commenced before such approval *cannot be cured by a subsequent approval*. *Ib.*

A claimant is estopped by his own act, in presenting his claim to the administrator for allowance, from denying that he had notice of the grant of administration; and in such a case it is immaterial whether publication was made or not. *Ib.*

Where the evidence of a claim consists of a *mortgage alone*, it must be presented for allowance and approval; but where a note or bond has been executed, *it would seem* that the allowance and approval of such note or bond would be sufficient. *Ib. Quaere.*

It may well be questioned, if a mortgagee could not sue for the *foreclosure of the mortgage* without having presented it to the administrator. But he could not sue for the debt without complying with the forms and requisitions of the statute. *Cole v. Robertson*, 6 Texas R., 356.

If an account against an estate has been allowed and approved, it cannot be questioned, *so far as the creditor is concerned, in the probate court*. But if allowed by mistake, or through fraud, the remedy by the administrator is by suit in the district court. *Neill v. Hodge*, 5 Texas R., 487.

But see the opinion in *Beckett v. Selover*, 7 Cal. R., at pp. 238, 239.

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## CHAPTER VII.

### SALES OF PROPERTY BY EXECUTORS OR ADMINISTRATORS. (a.)

Sale to be under order of court

§ 148. No sale of any property of an estate shall be valid, unless made under order of the probate court.

But see Sec. 178.

Petition for sale.

§ 149. All applications for orders of sale shall be by petition in writing, in which shall be set forth the facts showing the sale to be necessary; and upon the hearing, any person interested in the estate may file his written objections, which shall be heard and determined.

[Forms No. 81 85, 88, 91, 93, and 97, Appendix.]

See Sec. 158, *infra*, and cases noted.

On application to sell real estate, the heirs or devisees may oppose the ap-

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(a.) See cases noted at the end of the chapter.



plication by attacking the claims of the creditors; they may set up the statute of limitations. *Skedmore v. Romaine*, 2 Bradford's R., 122.

See *Beckett v. Selover*, noted under section 133, *supra*.

§ 150. At the term of the court to which the inventory is returned, the executor or administrator shall apply for an order to sell the perishable property of the estate, and so much other property as may be necessary to be sold to pay the allowance made to the family of the deceased. If claims against the estate have been allowed, and a sale of property shall be necessary for their payment, or of the expenses of the administration, he shall also apply for an order to sell so much of the personal property as shall be necessary. He shall make a similar application, either in vacation or term, giving five days previous notice in a newspaper or by the usual public posting, from time to time, so long as any personal property remains in his hands, and a sale is necessary to pay any demands against the estate.

Sale of perishable property.

Of personal property for payment of debts.

[Forms No. 81 to 95, Appendix.]

§ 151. If it appear that a sale is necessary, the court shall order it to be made. In making such sales, the court shall order such articles as are not necessary for the support and subsistence of the family of the deceased, or are not specially bequeathed, to be first sold. Articles so bequeathed, shall not be sold until the residue of the personal estate has been applied to the payment of the debts.

If sale ordered, what articles first sold.

Bequeathed articles.

In connection with the last clause of the section, in regard to the sale of bequeathed articles, see sections 176, 177, 180 and 243, *post*.

§ 152. The sale of personal property shall be made at public auction, and after public notice given for at least ten days, unless for good reason shown, the probate judge shall order a private sale; but no private sale shall be effectual for any purpose till the same shall be approved by the probate judge. Public sales of such property shall be made at the court house door,—at the residence of the deceased, or at some other public place, to be mentioned in the notice; and no sale shall be made of any property which is not present at the time of selling. (a.)

Sale how made.

Private sale.

Property to be present when sold.

[Forms No. 83, 84, 90, 92, Appendix.]

(a.) Amended May 7, 1855. See Statutes 1855, p. 299. The section as it originally stood in the act of May 1, 1851, was as follows:—"Sec. 152. Sale of personal property shall be made at public auction, and after public notice given for at least ten days. The sale may be made either at the court house door—at the residence of the deceased, or at some other public place." Statute 1851, p. 467; Compiled Laws, p. 398; Statute 1850, p. 389.

§ 153. The notice shall be given by notices posted in the  
Notice how given. [three ?] public places in the county, or by publication in a newspaper, if the judge shall so order, in which shall be specified the time and place of sale.

[Form No. 82, Appendix.]

§ 154. When the personal estate in the hands of the execu-  
Sale of real estate. tor or administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose, upon the order of the county judge.

[Form No. 97, Appendix.]

See sections 164 and 179, *post*.

§ 155. To obtain such order, he shall present a petition to  
Petition for, what to contain. the probate court, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of,—the debts outstanding against the deceased, as far as the same can be ascertained—a description of all the real estate of which the testator or intestate died, seized, and the condition and value of the respective portions and lots,—the names and ages of the devisees, if any, and of the heirs of the deceased,—which petition shall be verified by the oath of the party presenting the same.

To be verified.

[Forms No. 97 and 112, Appendix.]

§ 156. If it shall appear by such petition that there is not sufficient personal estate in the hands of the executor or administrator, to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, the probate judge shall thereupon make an order directing all persons interested, to appear before him at a time and place specified, not less than four, nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator, to sell so much of the real estate of the deceased as shall be necessary to pay such debts.

Order to show cause.

[Forms No. 98, 113, Appendix.]

§ 157. A copy of such order to show cause, shall be personally served on all persons interested in the estate, at least  
Notice of application to be served, or published. ten days before the time appointed for hearing the petition,

or shall be published at least four successive weeks, in such newspaper as the court shall order; *provided, however*, if all persons interested in the estate, shall signify in writing, their assent to such sale, the notice may be dispensed with.

[Form No. 98, Appendix.]

Whether the want of a sufficient notice of an application to sell the real estate, can be set up as a defence in an action by the purchaser to recover possession of the property—*quaere*. *Haynes v. Meeks*, Jan. term, 1858.

But *semble*, that a direct proceeding to set aside the sale, would be preferable. It may be a matter of grave doubt whether a sale of real estate without sufficient notice, would be void, or merely voidable. The sale being a proceeding *in rem*, there may not be any sufficient reason for holding it void by reason of a defective notice. *Ib*.

And see same case fully noted at the end of this chapter.

§ 158. The probate judge, at the time and place appointed in such order, or at such other time as the hearing may be adjourned to, upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale of all parties interested, shall proceed to the hearing of such petition; and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate, who may oppose the application.

The hearing.

[Form No. 110, Appendix.]

See Sec. 149, *supra*.

The heirs or devisees may make the same defense to the claims sought to be established before the Surrogate, as they could before another tribunal. *Ferguson v. Broome*, 1 Bradford's R., 10.

The heirs have a right to go behind the allowance of claims against the estate by the administrator and the approval of the county judge, and to require proof of the original indebtedness, after petition and notice, for the sale of real estate to pay debts. *Beckett et al., v. Selover*, 7 Cal. R., 215.

§ 159. If any of the devisees or heirs of the deceased are minors and have a general guardian in the county, the copy of the order shall be served upon the guardian. If they have no such guardian, the court shall, before proceeding to act upon the petition, appoint some disinterested person their guardian, for the sole purpose of appearing for them, and taking care of their interests in the proceedings.

Guardian of minors to be served.

Guardian to be appointed.

[Form No. 117, Appendix.]

§ 160. The executor or administrator may be examined on oath, and witnesses may be examined by either party, and process to compel their attendance and testimony, may be

Witnesses, etc.

issued by the probate judge, in the same manner, and with like effect as in other causes.

§ 161. If it shall appear to the court that it is necessary to sell a part of the real estate, and that by a sale of such part, the residue of the estate, or some specific part or piece thereof, would be greatly injured, the court may authorize the sale of the whole estate, or of such part thereof as may be judged necessary, and most for the interests of all concerned.

Sale of part or  
whole of estate.

§ 162. If the probate judge shall be satisfied, after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate, is necessary for the payment of the allowance of the family, and all valid claims against the deceased, and charges of administration, or if such sale be assented to by all the persons interested, he shall make an order of sale, authorizing the executor or administrator to sell the whole, or so much and such parts of the real estate described in the petition, as he shall judge necessary or beneficial.

Order of sale.

[Forms No. 99, 111, 114 and 116, Appendix.]

See Sec. 73, *ante*, and see form No. 38, Appendix.

§ 163. The order shall specify the lands to be sold and the terms of sale, which may be either for cash or on a credit not exceeding six months, as the court may direct. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts, the court shall order that part descended to heirs to be sold, before that so devised.

To specify lands  
to be sold.

Lands devised.

§ 164. If the executor or administrator shall neglect to apply for an order of sale whenever it may be necessary, any person interested in the estate may make application therefor in the same manner as the executor or administrator, and notice thereof shall be given to the executor or administrator before the hearing.

Application by  
person interested

[Form No. 111, Appendix.]

Proceedings to compel sale of real estate for payment of debts, cannot be instituted by a creditor until the executor or administrator has accounted. *Skidmore v. Romaine*, 2 Bradford's R., 122.

§ 165. Upon the making of such order, a certified copy of the order of sale shall be delivered by the court to the executor or administrator, who shall be thereupon authorized to sell the real estate as directed.

Authority to sell.

§ 166. When a sale is ordered, notice of the time and place of holding the same, shall be posted up in three of the most public places in the county in which the land is situated, and shall be published in a newspaper, if there be one printed in the same county, and if there be none, then in such paper as the court may direct, for three weeks successively next before such sale, in which notice the lands and tenements to be sold, shall be described with common certainty.

Notice of sale.

[Form No. 108, Appendix.]

§ 167. Such sale shall be in the county where the lands are situated, at public auction, between the hours of nine o'clock in the morning and the setting of the sun the same day.

Time and place of sale.

§ 168. The executor or administrator shall, when the sale is made upon a credit, take the note or notes of the purchaser for the purchase money, with a mortgage on the property to secure their payments.

If on credit.

[Forms No. 111, 114 and 116, Appendix.]

§ 169. The executor or administrator making any sale of any real estate, shall, at the next term of the court thereafter, make a return of his proceedings to the probate judge, who shall examine the same, and if he shall be of opinion that the proceedings were unfair, or that the sum bid is disproportionate to the value, and that a sum exceeding such bid, at least ten per cent., exclusive of the expenses of a new sale, may be obtained, he shall vacate such sale, and direct another to be had, of which notice shall be given, and the sale shall be in all respects conducted as if no previous sale had taken place.

Return of sale, etc.

Re-sale, when ordered.

[Forms No. 100, 104, 108, 102 and 103, Appendix.]

§ 170. When the return of the sale is made, any person interested in the estate may file written objections to the confirmation of the sale, and may be heard, and may produce witnesses in support of his objections.

Objections.

[Forms No. 105 and 106, Appendix.]

§ 171. If it appear to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale, and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid, and a certified copy of the order authorizing the sale, and of the order confirming the same and directing conveyances to be executed, shall be recorded in the office of the recorder of the county within which the land sold is situated. (a.)

Confirmation.      Effect of order.      To be recorded.

[Forms No. 101, 106, 107, 115, 118 and 96, Appendix.]

See sections 186, 187, and compare section 183.

From the language of this section, it would seem that the sale is complete upon the order of confirmation being made. Whether the purchaser would be entitled to the rents and profits of the real estate from the time of confirmation, and before the execution and delivery of the deed, in case of such execution and delivery being for any cause delayed—*Quære*.

§ 172. Such conveyances shall thereupon be executed to the purchaser by the executor or administrator. They shall refer to the orders of the probate court, authorizing and confirming the sale of the property of the testator or intestate, and directing conveyances thereof to be executed, and to the record of such orders in the office of the county recorder, and such reference shall have the same effect as if the said orders were at large inserted in the conveyance. The conveyances so made, shall be deemed to convey all the right, title, interest, and estate of the testator or intestate, in the premises at the time of his death. (b.)

Conveyance.      Effect of.

[Form No. 119, Appendix.]

§ 172. A. (Sec. 3.) This act shall take effect from and after its passage, and shall also apply to all cases wherein either an order of sale or an order confirming a sale, and

(a.) Amended Feb. 1, 1856. Statutes 1856, p. 20, sec. 1. The amendment added all that portion of the present section after the words "confirmed and valid." Original section, Statute 1851, p. 470; Compiled Laws, p. 401.

(b.) Amended Feb. 1, 1856. Statutes 1856, p. 20, sec. 2. The original section was as follows:—"Sec. 172. Such conveyances shall thereupon be executed to the purchaser by the executor or administrator. *They shall contain and set forth at large*, the original order, authorizing a sale, and the order confirming the same, and directing the conveyance, and they shall be deemed to convey all the estate, rights and interest in the premises, of the testator or intestate, at the time of his death." Statute 1851, p. 470; Compiled Laws, p. 401; and Statute 1850, p. 391.

directing a conveyance to be executed, or both, may have been heretofore made, and wherein the conveyance has not been executed, at the date of the passage of this act. (a.)

Sales by executors and administrators, under our probate system, are judicial; and the contract need not be in writing subscribed by the parties. The statute of frauds does not apply to such a case, the sale being made by the court. *Halleck et al., v. Guy*, Jan. term, 1858.

The only effect of an administrator's deed, is to convey to the purchaser *the title of the deceased*. Such a deed can contain no warranty of the title. The bidder is bound to examine the title for himself; and the rule of *caveat emptor* applies to these sales. *Ib.*

§ 173. Before any order is entered confirming the sale, it shall be proved to the satisfaction of the court, that notice was given of the sale as herein prescribed, and the order of confirmation shall state that such proof was made. Proof of notice required.

[Forms No. 108, 101, 107, and 118, Appendix.]

Compare sections 63 and 238.

§ 174. If at the time appointed for the same, the executor or administrator shall deem it for the interest of all persons concerned therein, that the sale shall be postponed, he may adjourn the same from time to time, not exceeding in all three months. Adjournment of sale.

§ 175. In case of the adjournments, notice thereof shall be given by a public declaration at the time and place first appointed for the sale, and if the adjournment be for more than one day, further notice shall be given, by printing, [*posting?*] or publishing the same, or both, as the time and circumstances may admit. Notice of adjournment.

§ 176. When a testator shall have given any legacy by will that is effectual to pass or charge real estate, and his goods, chattels, rights and credits, shall be insufficient to pay such legacy, together with his debts and the charges of administration, the executor or administrator with the will annexed, may obtain an order to sell his real estate for that purpose, in the same manner and upon the same terms and conditions, as are prescribed in this chapter, in case of a sale for the payment of debts. Sale of real estate to pay legacy.

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(a.) Sec. 3, of the act of February 1, 1856, Statute 1856, p. 21, sections 1 and 2, amend the 171st and 172d sections of the probate act respectively; and Sec. 3, declares when those sections as amended shall take effect, etc.

§ 177. If the testator shall make provision by his will, or Provisions of will to be followed. designate the estate to be appropriated for the payment of his debts, the expenses of administration or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, so far as the same may be sufficient.

§ 178. When such provision has been made, or any property directed by the will to be sold, the executor or administrator with the will annexed, may proceed to sell without the order of the probate court, but he shall be bound as an administrator, to give notice of the sale, and to return accounts thereof to the court, and to proceed in making the sale in all respects as if it were made under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions. When executor, etc., may sell without order of court.

[Form No. 96, Appendix.]

§ 179. If the provision made by the will, or the estate appropriated, be not sufficient to pay the debts and expenses of administration and family expenses, such part of the estate as shall not have been disposed of by the will, if any, shall be appropriated for that purpose according to the provisions of this act. If provision made by will, insufficient.

§ 180. The estate, real and personal, given by will to any legatees or devisees, shall be held liable to the payment of debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, except that specific devises or legacies may be exempted, if it shall appear to the court necessary, to carry into effect the intention of the testator, if there shall be other sufficient estate. Estate bequeathed liable for payment of debts.

See sections 151, 176 and 177.

§ 181. When the estate given by any will has been sold for the payment of debts and expenses, all the devisees and legatees shall be liable to contribute according to their respective interests, to any devisee or legatee from whom the estate devised to him may have been taken for the payment of debts or expenses; and the probate court, when distribution is made, shall, by decree for that purpose, settle Contribution among legatees, etc.



the amount of the several liabilities, and decree how much each person shall contribute.

[Form No. 175, Appendix.]

See Sec. 258.

§ 182. If a deceased person, at the time of his death was possessed of a contract for the purchase of lands, his interest in such land, and under such contracts, may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose, as are prescribed in this chapter, in respect to lands of which he died seized, except as hereinafter provided.

Sale of interest  
in lands.

§ 183. Such sale shall be made subject to all payments that may thereafter become due on such contracts; and if there be any such payments thereafter to become due, such sale shall not be confirmed by the probate judge, until the purchasers shall execute a bond to the executor and [or?] administrator for his benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve.

Sale subject to  
payments, etc.

Bonds by pur-  
chaser.

[Form No. 120, Appendix.]

§ 184. Such bond shall be conditioned that the purchaser will make all payments for such land, that shall become due after the date of such sale, and will fully indemnify the executor or administrator, and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract; but if there be no payments thereafter to become due on such contract, no bond shall be required by the purchaser.

Condition of  
bond, etc.

[Forms No. 120, Appendix.]

§ 185. Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser, an assignment of the contract, which assignment shall vest in the purchaser, his heirs and assigns, all the right, title, and interest, of the persons entitled to the interest of the deceased, in the lands sold, at the time of the sale, and such purchaser shall have the same rights and remedies against the vendor of such land, as the deceased would have had if he were living.

Assignment of  
contract.

Effect thereof.

Where land sold subject to lien, etc.

§ 186. When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of land subject to any mortgage or lien, which is a valid claim against the estate of the deceased, the purchase money shall be applied after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage, and the residue in due course of administration.

Expenses of sale first paid.

§ 187. In all cases in which land is sold by an executor or administrator, the necessary expenses of the sale shall be first paid out of the proceeds.

Misconduct in sale.

§ 188. If there shall be any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate shall suffer damages, the party aggrieved may recover the same in a suit upon the bond of the executor or administrator, or otherwise, as the case may require.

Fraudulent sales.

§ 189. Any executor or administrator who shall fraudulently sell any real estate of his testator or intestate, contrary to the provisions of this chapter, shall be liable in double the value of the land sold, as damages, to be recovered in an action by the person having an estate of inheritance therein.

Limitation of action by heir, etc.

§ 190. No action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale.

Preceding section not to apply to minors, etc.

§ 191. The preceding section shall not apply to minors or others under any legal disability to sue, at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability.

Executor, etc., to return account of sales.

How enforced.

§ 192. Whenever a sale has been made by an executor or administrator, of any property of the estate, real or personal, it shall be his duty to return to the probate court, at its next term thereafter, an account of sales verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice

having been first given him, to appear and show cause why such attachment should not issue, or such revocation should not be made.

[Forms No. 65 and 66, Appendix.]

§ 193. No executor or administrator shall directly, or indirectly purchase any property of the estate he represented.

Executor, etc., shall not purchase property of estate.

Where an administrator purchases land at a judicial sale, made to satisfy a claim in favor of the estate which he represents, and causes the purchase money to be credited on the claim, the purchase enures to the benefit of the estate, and after the close of the administration, the heirs may recover the land, notwithstanding the administrator may have accounted for the purchase money in the final settlement of his accounts, and sold the land to a third person having notice of the facts. *McCoy v. Crawford*, 9 Texas R., 353.

A purchase made by an administrator at his own sale, is fraudulent in law, and void, and it is not error so to instruct a jury. *Hardy v. De Leon*, 5 Texas R., 212.

*Cases bearing upon the matters treated of in Chapter VII., not noted under the preceding sections.*

Sales of real estate must be conducted in strict compliance with the law, and the records of the proceedings may be offered to show that the rules of law have not been observed. The purchaser at the sale, may show by the records of the probate court, that the sale was not made according to the statute, to establish a failure of the consideration of the note, given by him on the sale. *Laughman v. Thompson*, 6 Smedes & Marshall's R., 259.

A sale not made in accordance with the statutory directions, is void. *Wiley v. White*, 3 Stew. & Port., Ala. R., 355.

The sale being advertised for "Friday the 17th," whereas *Friday was the 16th*, and the mistake not being corrected till the last publication, made on the day of the sale: *Held*, that the mistake was sufficient to avoid the sale. *Wellman v. Lawrence*, 15 Mass. R., 326.

A sale made twelve years after license (order of sale) granted, held void, for that cause. *Ib.*

Under a will authorizing "the executors" to sell lands, it was held that a sale by one executor, who alone of three appointed, qualified,—was valid, without showing that the others renounced or refused to join. *Wood v. Sparks*, 1 Dev. & Bat., N. Carolina R., 389.

An administrator, conveying real estate under the order of the court, may make the deed to the assignee of the original purchaser. *Ewing v. Higby*, 7 Ham., (part 1st.) 198.

Upon an application by an administrator after the filing of an inventory for the sale of the real estate of intestate for the payment of debts, the Surrogate gains jurisdiction, by the presentation of the petition, as against all parties regularly brought into court. *Farrington v. King*, 1 Bradford's R., 182.

And after jurisdiction has been thus obtained of the subject matter and the parties, errors or irregularities in its exercise, cannot be impeached collaterally, but only by appeal; and after the Surrogate has made an order for the sale of the property, it will be presumed that he had sufficient evidence of the facts necessary to be ascertained, before making such judicial determination. *Ib.*

The administrator having made application for the sale of real estate and proceedings had, and the order made, he cannot at his option discontinue proceedings; but the creditors may assist on his proceeding, and may apply to revive or expedite his proceedings. *Ib.*

But see Sec. 164, *supra*.

Upon an application to sell real estate of an intestate for the payment of his debts, equitable as well as legal demands may be proved and established against the estate. *Renwick v. Renwick*, 1 Bradford's R., 234.

And see *Campbell v. Renwick*, 2 Bradford's R., 80; *Treat v. Fortune*, 2 Bradford's R., 116.

In proceedings to sell real estate for the payment of debts, it is competent for the heirs or devisees to show that the personal estate has not been applied to the payment of the debts. But the sale may be ordered by the Surrogate upon satisfactory evidence that reasonable diligence has been had, in making such application. *Skidmore v. Romaine*, 2 Bradford's R., 122.

An executor will not be required to sell lease-hold premises, on which the testator built a private vault in which he was interred, before the real estate can be sold for the payment of the debts. *Ib.*

Where the resignation of an administrator has been improperly accepted, and the acceptance is voidable for error, but not void; the successor of the administrator so resigning having sold land under the order of the probate court: *Held*, that the purchaser could maintain ejectment against a grantee of the heir; as, whether the sale be void or voidable, the purchaser who has paid the debts of the estate, should have a lien upon the estate, for his purchase money. *Haynes v. Meeks*, Jan. term, 1858.

## CHAPTER VIII.

### OF THE POWERS AND DUTIES OF THE EXECUTOR AND ADMINISTRATOR, AND OF THE MANAGEMENT OF THE ESTATE. (a.)

§ 194. The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and shall collect all debts due to the deceased.

Executor, etc.  
to take possession  
of estates.

Compare Sec. 114, *supra*.

"At common law, the real estate of the intestate vested in the heir, and the personal estate in the administrator. But under our system, the true theory would seem to be, that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts,

(a.) See cases noted at the end of the chapter.

and the expenses of administration, and with the right in the administrator of present possession."

See opinion, in *Beckett et al., v. Selover*, 7 Cal. R., 215; also, *Harwood v. Marye*, October term, 1857.

An executor has no authority until the will is proved. *Tucker v. Starks*, Brayt. R., 99.

§ 195. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained, by and against executors and administrators, in all cases in which the same might have been maintained, by or against their respective testators or intestates.

Actions by and against executors, etc., when maintainable.

See Sec. 131, and cases noted.

As to actions against executors and administrators, see sections 136 to 144, inclusive; section 200, and cases noted at the end of this chapter.

Actions against an estate cannot be sustained, until the appointment of an administrator; and the complaint must show a presentation to him for payment. *Harwood v. Marye et al.*, Oct. term, 1857.

The administrator, being entitled to the possession of the real property, must be made a party to all suits affecting it. And in an action to foreclose a mortgage, the complaint setting out the note and mortgage sued on, and alleging that Smith, one of the mortgagors, was dead, the administrator of Smith not being made a party, and it not appearing that any administrator had been appointed: *Held*, that the complaint was defective for want of proper parties. *Ib.*

Mortgages, and liens of record, form no exception to the rule, requiring a presentation of the claim to the administrator, etc., before suit brought. *Ellisen v. Halleck*, 6 Cal. R., 386.

But see *Cole v. Robertson*, noted under section 131, *ante*.

§ 196. Executors and administrators may maintain actions against any person who shall have wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his life time. They may also maintain actions for trespass, committed on the real estate of the deceased in his life time.

Actions by executor, etc., for waste, etc.

§ 197. Any person, or his personal representatives, shall have an action against the executor or administrator of any testator or intestate, who in his life time shall have wasted, destroyed, taken, or carried away, or conveyed to his own use, the goods or chattels of any such person, or committed any trespass, on the real estate of such person.

Action for waste or trespass of testator.

§ 198. When there was any partnership existing between the testator or intestate, at the time of his death, and any

Where deceased possessed an interest in a partnership.

other person, the surviving partner shall have the right to continue in possession of the effects of the partnership, and to settle its business ; but the interest of the deceased shall be included in the inventory, and appraised as other property. The surviving partner shall proceed to settle the affairs of the partnership without delay, and shall account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of his testator or intestate. Upon the application of the executor or administrator, the probate judge may, whenever it may appear necessary, order the surviving partner to render an account, and in case of neglect or refusal, may, after notice, compel it by attachment. And the executors or administrators, may maintain against him, any action which his testator or intestate could have maintained.

Surviving partner to account.

See *Thomson v. Thomson*, noted *ante*, pp. 57 and 58.

Actions on bond of executor, etc.

§ 199. Any administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

What executors to join as parties.

§ 200. In actions brought by or against executors, it shall not be necessary to join those as parties, to whom letters shall have been issued, and who have not qualified.

Compounding debts.

§ 201. Whenever a debtor of a deceased person, shall be unable to pay all his debts, the executor or administrator, with the approbation of the probate judge, may compound with him, and give him a discharge, upon receiving a fair and just dividend of his effects.

Recovery of property fraudulently disposed of by testator.

§ 202. When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall, in his life time, have conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty, to commence and prosecute to final judgment, any proper action for the recovery of the same ; and may recover, for the benefit of the creditors, all such real estate, so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover

Duty of executor, etc., to commence suits.

all goods, chattels, rights, or credits, which may have been so fraudulently conveyed by the deceased in his life time, whatever may have been the manner of such fraudulent conveyance.

See *Danzey v. Smith*, noted at the end of the chapter.

§ 203. No executor or administrator shall be bound to sue for such estate as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors of the deceased; nor unless the creditors making the application shall pay such part of the costs and expenses, or give such security to the executor or administrator therefor as the probate judge shall direct.

When executor  
to sue as provid-  
ed in preceding  
section.

§ 204. All real estate so recovered, shall be sold for the payment of debts, in the same manner as if the deceased had died seized thereof, upon obtaining an order therefor from the probate court, and the proceeds of all goods, chattels, rights, and credits, so recovered, shall be appropriated in payment to the debts of the deceased, in the same manner as other property in the hands of the executor or administrator.

Disposition of  
estate recovered.

*Cases bearing upon the matters treated of in Chapter VIII., not noted under the preceding sections.*

Wherein an action against an administrator, the complaint is founded upon an instrument alleged to have been executed by the intestate, it is not necessary under the statute that the administrator should deny the signature of the intestate on oath. It must be proved. *Heath v. Lent*, 1 Cal. R., 410.

Where a bill is filed in chancery against an administrator, to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement. *Clarke v. Perry*, 5 Cal. R., 58.

Where the administrator of a defaulting tax collector was sued in equity, in the name of the People, to compel him to pay into the hands of the county treasurer, money collected by intestate as such tax collector: *Held*, that he occupied the position of one who takes possession, without authority, of property belonging to another, and may be treated as *trustee de son tort*. *People v. Houghtaling*, 7 Cal. R., 348.

Though defendant be described in such action as administrator (in the caption of the complaint), yet if the allegations and facts set forth show that he is not sought to be charged as administrator, and no relief is sought against the estate, an objection that he is improperly sued in his representative capacity, is untenable. *Id.*

In actions upon joint and several contracts or obligations, an administrator cannot be joined with the survivor, because the one is sued *de bonis testatoris*, and the other *de bonis propriis*. *Humphrey v. Yale*, 5 Cal. R., 173; *May v. Hanson*, 6 Cal. R., 642.

Where a bill for the foreclosure of a mortgage, made by the deceased, is filed against his executor, and no averment of presentation and rejection of the account is made in the bill, it is demurrable. *Ellisen v. Halleck*, 6 Cal. R., 386.

The general right to sue an administrator being taken away by the statute, the declaration must bring the case within the exception so as to give the court jurisdiction.—*Id.*

An executor has no authority until the will is proved. *Tucker v. Starkes*, Brayt. R., 99.

One, of two joint executors or administrators, may discharge a debt. *Gleason v. Little*, 1 Aiken's R., 28.

Where there are two executors, each has a right to receive the debts and assets, and each is answerable for what he receives. *Edmonds v. Cranshaw*, 14 Peters' Sup. Ct. R., 166.

It is sufficient that a claim is presented to, and rejected by, one of several administrators, to authorize a suit. *Dean v. Duffield*, 8 Texas R., 235.

Joint administrators stand on the same footing, and are invested with the same authority in respect to the administration, as co-executors; like them, they are regarded in law as one person, and consequently the acts of one, in respect to the administration, are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property. *Id.*

Under a will authorizing the "executors" to sell lands, it was held that a sale by one executor, who alone of three appointed, qualified, was valid, without showing that the others renounced or refused to join. *Wood v. Sparks*, 1 Dev. & Bat., N. Carolina R., 389.

Co-administrators stand as sureties for each other; and if one is misapplying and squandering the assets of the estate, the liability of the other to be seriously injured, is a sufficient ground for relief on general principles of equity. *Davis v. Thorn*, 6 Texas R., 482.

After an administrator has been discharged, the jurisdiction of the county court as to him is terminated, and he cannot be cited to come into court and re-state his account. *Francis v. Northcote*, 6 Texas R., 185.

An administrator who has been removed, cannot be required to surrender his own vouchers, or any papers necessary to his own defence. *Miller v. Jasper*, 10 Texas R., 513.

An administrator is bound to defend the estate of his intestate against claims which he does not think just, and he is entitled to charge legal expenses to the estate. *Scott's Estate*, 9 Watts & Serg., 98; *Davis v. Rawlins*, 2 Harring, 125.

The administrator of a fraudulent vendor, must use proper means to secure the property fraudulently sold, to the creditors; otherwise he will be liable to an action by them. *Danzy v. Smith*, 4 Texas R., 411.

But see Sec. 203, *ante*.

The acts of an administrator may be set up as an estoppel *in pais*, to bar a recovery by the estate which he represents. *Thomas v. Brooks*, 6 Texas R., 869.

In the case of a mortgage debt due by the estate of a deceased person, which has been allowed by the executor and the probate judge, there is no necessity for a foreclosure against the estate, and the policy of the law being against burdening an estate with unnecessary costs, such a bill will not lie. *Falkner v. Folsom's Executors*, 6 Cal. R., 412.

A judgment against an administrator, though in the form of a common



money judgment by default, is valid, its only effect being to establish the validity of the claim. *Chase v. Swain*, Jan. term, 1858.

A judgment by default may as well be taken against an administrator as any other party. *Id.*

The representatives of a deceased joint mortgagor, should not be joined with the survivor in a suit to foreclose a mortgage. The mortgagee should pursue his remedy against the representative of the deceased mortgagor in the probate court, while the remedy against the surviving mortgagor would be by foreclosure in the district court. *Martin v. Harrison*, 2 Texas R., 456.

The administrator being under our system, entitled to the possession of the real property, must be made a party to all suits affecting it. *Harwood v. Marye et al.*, Oct. term, 1857.

The complaint after setting out the note and mortgage sued on, alleges that Smith, one of the mortgagors, is dead; that one William Smith, a resident of Virginia, is his heir. It not appearing by the complaint whether there was any administrator of the estate of Smith, and no presentation of the claim for allowance being alleged: *Held*, that the action could not be maintained, and that the fact of there being no administrator will not excuse want of presentation. *Id.*

## CHAPTER IX.

### CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

§ 205. When any person who is bound by contract in writing, to convey any real estate, shall die before making the conveyance, the probate court may make a decree, authorizing and directing the executor or administrator, to convey such real estate to the person entitled thereto, in all cases where such deceased person, if living, might be compelled to make such conveyance. Executor, etc., when directed to convey real estate.

[Forms No. 132, 135, 136 and 138, Appendix.]

§ 206. On the presentation of a petition of any person claiming to be entitled to such conveyance, from any executor or administrator, setting forth the facts upon which such claim is predicated, the probate judge shall appoint a time and place for hearing such petition, which shall be at a regular term of the court; and shall order notice of the pendency thereof, and of the time and place of hearing, to Petition for conveyance.

Notice of hearing

be published at least four successive weeks before such hearing, in such newspaper in this State, as he may designate.

[Forms No. 131, 137, 133 and 134, Appendix.]

The hearing parties interested may file objections.

§ 207. At the time and place appointed for such hearing, or at such other time, as the same may be adjourned to, upon proof by affidavit, of the due publication of the notice, the court shall proceed to a hearing, and all persons interested in the estate, may appear and defend such petition, by filing their objections in writing, and the court may examine on oath the petitioner, and all who may be produced before him for that purpose.

[Form No. 134, Appendix.]

Conveyance may be decreed.

§ 208. After a full hearing upon such petition and objections, and examination of the facts and circumstances of the claim, if the probate judge is satisfied that the petitioner is entitled to a conveyance of the real estate described in his petition, he shall make a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner.

[Forms No. 132, 135, 136 and 138, Appendix.]

Appeal from decree. Copy to be recorded: its effects as evidence.

§ 209. Any person interested, may appeal from such decree, to the district court for the same county, as in other cases; but if no appeal be taken from such decree within the time limited therefor by law, or if such decree be affirmed on appeal, it shall be the duty of the executor or administrator to execute the conveyance according to the directions contained in the decree, and a certified copy thereof shall be recorded with the deed, in the office of the recorder, in the county where the lands lie, and shall be evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make such conveyance. (a.)

When petitioner may proceed in district court.

§ 210. If, upon a hearing in the probate court, as herein before provided, the probate judge shall doubt the right of the petitioner to have a specific performance of the contract, he shall dismiss the petition, without prejudice to the rights of the petitioner, who may at any time within six months thereafter, proceed in the district court to enforce a specific performance.

Effect of conveyance.

§ 211. Every conveyance made in pursuance of a decree

(a.) See *ante*, p. 19-21.

of the probate court, as provided in this chapter, shall be effectual to pass the estate contracted for, as fully as if the contracting party himself was still living, and then executed the conveyance.

§ 212. A copy of the decree for a conveyance made by the probate court, and duly certified and recorded in the office of the recorder of the county where the lands lie, shall give the person entitled to the conveyance, a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

Decree for conveyance, when recorded, to give right of possession.

§ 213. The recording of any decree, as provided above, shall not prevent the court making such decree, from enforcing the same by other process.

Decree may be enforced by other process.

§ 214. If the person to whom the conveyance was to be made, shall die before the commencement of the proceedings, according to the provisions of this chapter, or before the completion of the conveyance, any person who could have been entitled to the estate under him as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of the person so entitled, may commence such proceedings, or may prosecute the same, if already commenced, and the conveyance shall be so made as to vest the estate in the same person who would have been entitled to it, or in the executor or administrator for their benefit.

Proceedings in case of death of party entitled to conveyance.

## CHAPTER X.

### ACCOUNTS TO BE RENDERED BY EXECUTORS AND ADMINISTRATORS, AND PAYMENT OF DEBTS. (a.)

§ 215. No executor or administrator, shall be chargeable upon any special promise to answer damages, or to pay the debts, of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing, and signed by such executor or administrator, or by some other person, by him thereunto specially authorized.

Executor, etc.,  
not personally  
liable, except up-  
on written pro-  
mise.

§ 216. Every executor and administrator, shall be chargeable in his accounts, with the whole of the estate of the deceased, which may come to his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

Executor, etc.,  
chargeable for in-  
come, etc., of es-  
tate.

[Form No. 167, Appendix.]

§ 217. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He shall account for the excess, when he shall sell any part of the estate for more than the appraisement, and if any shall be sold for less than the appraisement, he shall not be responsible for the loss, if the sale has been justly made.

When charge-  
able with loss and  
accountable for  
excess.

[Form No. 167, Appendix.]

§ 218. No executor or administrator shall be accountable for any debts due to the deceased, if it shall appear that they remain uncollected without his fault.

Uncollected  
debts.

[Form No. 167, Appendix.]

§ 219. He shall be allowed all necessary expenses, in the care, management, and settlement of the estate, and for his services, such fees as the law provides; but when the de-

Necessary ex-  
penses and legal  
fees allowed.  
When will pro-  
vides for compen-  
sation.

(a.) See cases noted at the end of the chapter.

ceased shall, by his will, make some other provision for the compensation of his executor, that shall be deemed a full compensation for his services, unless he shall by a written instrument, filed in the probate court, renounce all claim for compensation provided by the will.

[Form No. 140, Appendix.]

§ 220. No administrator or executor shall purchase any claim against the estate he represents ; and if he shall have paid any claim for less than its nominal value, he shall only be entitled to charge in his account, so much as he shall have actually paid.

[Form No. 154, Appendix.]

Where an executor, under a power of sale, sold the testator's real estate at public action, and a third person, at the solicitation of the executor and for his benefit, purchased the premises: *Held*, that the sale, upon an accounting, might be treated as invalid, so far as to hold the executor responsible for the true value of the property at the time of the sale. *Ames v. Downing*, 1 Bradford's R., 321,

A person who, in view of taking the administration of an estate, purchases claims against the estate at a discount, is only entitled to credit for the amount actually paid. *Chevallier Admr. v. Wilson and wife*, 1 Texas R., 161.

§ 221. When no compensation shall have been provided by the will, or the executor shall renounce all claim thereto, he shall be allowed commissions upon the amount of the whole estate accounted for by him, as follows :—For the first thousand dollars, at the rate of seven per cent ; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent ; for all above that sum, at the rate of four per cent ; and the same commissions shall be allowed to administrators. In all cases, such further allowance may be made, as the probate judge may deem just and reasonable, for any extraordinary services, not required by an executor or administrator in the common course of his duty ; *provided*, the total amount of such allowances shall not exceed the amount of commissions allowed by this section.

Compensation  
of executors and  
administrators.

[Form No. 167, Appendix.]

This rule only applies where the administration is complete, and the estate finally settled. Where the administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation. The probate court should apportion it in reference to the compensation fixed by law for the whole, according to sound judgment. *Ord v. Little*, 3 Cal. R., 287.

§ 222. At the third term of the court after his appointment, and thereafter, at any time when required by the court,

Executor, etc.,  
to render account  
at the third term  
after his appoint-  
ment.

either upon its own motion, or upon the application of any person interested in the estate, the executor or administrator, shall render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters, necessary to show the condition of its affairs.

[Forms No. 141, 142, Appendix.]

In case of fail-  
ure to render ac-  
count citation to  
issue.

§ 223. If the executor or administrator, fail to render an exhibit at the third term of the court, it shall be the duty of the judge, to cause a citation to be issued, requiring him to appear and render it.

[Forms No. 143, Appendix.]

Petition for ac-  
count by party  
interested.

§ 224. Any person interested in the estate, may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator, be required to appear and render such exhibit, setting forth the facts, showing that it is necessary and proper that such an exhibit should be made.

[Form No. 142, Appendix.]

Citation, when  
issued.

§ 225. If the judge be satisfied, either from the oath of the applicant, or from any other testimony that may be offered, that the facts alleged are true, and shall consider the showing of the applicant sufficient, he shall direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which shall be during a term of the court, and render an exhibit as prayed for.

[Form No. 143, Appendix.]

Contesting ac-  
count.  
Letters. When  
revoked.

§ 226. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of negligence, or has wasted or embezzled, or mismanaged the estate, his letters shall be revoked.

[Forms No. 141 and 145, Appendix.]

Neglect to ap-  
pear, etc., how  
punished.

§ 227. If any executor or administrator, neglect or refuse to appear and render an exhibit, after having been duly cited, an attachment may be duly issued against him, or his letters may be revoked in the discretion of the court.

Form No. 144, Appendix.]

§ 228. Every executor or administrator, shall render a full account of his administration, upon the expiration of one year from the time of his appointment. If he fail to present his account, it shall be the duty of the judge to compel the rendering of such account by attachment, and any person interested in the estate, may apply for, and obtain an attachment, but no attachment shall issue, unless a citation has been first issued and returned, requiring the executor or administrator, to appear and show cause why an attachment should not issue.

[Forms No. 146 to 149, Appendix.]

§ 229. Whenever the authority of an executor or administrator, shall cease, or be revoked for any reason, he may be cited to account before the probate court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate, during the time he was executor or administrator.

§ 230. If the executor or administrator resides out of the county, or absconds or conceals himself, so that the citation cannot be personally served, and shall neglect to render an account within thirty days after the time above prescribed, or if he shall neglect to render an account within thirty days after being committed where the attachment has been executed, his letters shall be revoked.

[Form No. 150, Appendix.]

§ 231. In rendering his account, the executor or administrator shall produce vouchers for all charges and expenses which he shall have paid, which vouchers shall be filed, and remain in the court; and he may be examined on oath, touching such payments, and also touching any property and effects, of the deceased, and the disposition thereof.

[Forms No. 156 and 167, Appendix.]

§ 232. On the settlement of his account, he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own oath positive, to the fact of payment, specifying where, and to whom, the payment was made, and if such oath be uncontradicted; but such allowance in the whole, shall not exceed five hundred dollars for payment in behalf of any one estate.

§ 233. When the account is rendered for settlement, notice thereof shall be given by the clerk, by causing notices to be posted up, in three public places in the county. The notice shall set forth the name of the estate and of the executor or administrator, and the day appointed for the settlement of the account, which shall be on some day of a term of a court.

[Forms No. 151 and 152, Appendix.]

§ 234. On the day appointed, or any subsequent day to which the hearing may be adjourned by the court, any person interested in the estate, may appear and file his exceptions in writing to the account, and contest the same.

[Forms No. 154 and 164, Appendix.]

§ 235. If there be any minor interested in the estate, who has no legally appointed guardian, the court shall appoint some disinterested person to represent him, who, on behalf of the minor, may contest the account as any other person having an interest might contest it, and who shall be allowed by the court for his services a reasonable compensation.

[Form No. 153 and 159, Appendix.]

§ 236. The hearing and allegations of the respective parties may be adjourned from time to time as shall be necessary, and the court may appoint one or more auditors to examine the accounts and make report thereon, subject to confirmation, and may allow a reasonable compensation to such auditors, to be paid out of the estate of the deceased.

[Forms No. 155, Appendix.]

§ 237. The settlement of the account and the allowance thereof by the court, or upon appeal, shall be conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities shall cease, and in any action brought by any such person, the allowance and settlement of the account shall be deemed presumptive evidence of its correctness.

[Forms No. 156, 160, 165, 166 and 167, Appendix.]

§ 238. The account shall not be allowed by the court until it be first proved that notice has been given as required by



this chapter, and the decree shall show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of the fact.

[Forms No. 152, 156, 160, 165, to 167, Appendix.]

§ 239. The debts of the estate shall be paid in the following order : 1st, Funeral expenses ; 2d, The expenses of the last sickness ; 3d, Debts having preference by the laws of the United States ; 4th, judgments rendered against the deceased in his lifetime, and mortgages in the order of their date ; 5th, All other demands against the estate.

Order of payment of debts.

[Forms No. 156 and 167, Appendix.]

§ 240. The preference given in the preceding section to a mortgage, shall only extend to the proceeds of the property mortgaged. If the proceeds of such property be insufficient to pay the mortgage, the part remaining unsatisfied shall be classed with other demands against the estate.

Mortgage.

[Form No. 167, Appendix.]

§ 241. If the estate be insufficient to pay all the debts of any one class, each creditor shall be paid a dividend in proportion to his claim ; and no creditor of any one class shall receive any payment until all those of the preceding class shall be fully paid.

If estate insufficient.

[Forms No. 156, 161, 163 and 165, Appendix.]

§ 242. It shall be the duty of the executor or administrator, as soon as he has sufficient funds in his hands, to pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the deceased ; and he may retain in his hands the necessary expenses of administration, but he shall not be obliged to pay any other debt, or any legacy until, as prescribed in this act, the payment has been ordered by the court.

Payments to be made by executor, etc.

[Forms No. 156, 165 and 167, Appendix.]

§ 243. Upon the settlement of the accounts of the executor or administrator, at the end of the year, as required in this chapter, the court shall make an order for the payment of the debts as the circumstances of the estate shall require. If there be no sufficient funds in the hands of the executor or administrator, the court shall specify in the decree the sum to be paid to each creditor.

Payment of debts.

[Forms No. 156, 160, 161, 163 and 166, Appendix.]

§ 244. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, or established, or absolute, shall be paid into the court, where it shall remain to be paid over to the party when he shall become entitled thereto, or if he fail to establish his claim, to be paid over or distributed as the circumstances of the estate require: *Provided*, that if any creditor whose claim has been allowed, but is not yet due, shall appear and assent to a deduction therefrom of the legal interest for the time the claim has yet to run, he shall be entitled to be paid accordingly.

Provision for  
disputed and con-  
tingent claims.

§ 245. Whenever a decree shall be made by the probate court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for his claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator shall also be liable on his bond to each creditor.

After decree for  
payment of debts  
executor person-  
ally liable there-  
for.

§ 246. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment shall have any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees to contribute to the payment of his claim; but if the executor or administrator shall have failed to give the notice to the creditors as prescribed by this act, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed: *Provided*, that this section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

Also liable on  
bond.

§ 247. If the whole of the debts shall have been paid by the first distribution, the court shall proceed to direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled. But if there

Claims not in-  
cluded in order  
for payment of  
debts.

Order for pay-  
ment of legacies.

be debts remaining unpaid, the court shall give such extension of the time as may be reasonable for a final settlement of the estate.

[Forms No. 156, 173 and 174, Appendix.]

§ 248. At the time designated, or sooner, if within that time all the property of the estate shall have been sold, or there shall be sufficient funds in his hands for the payment of all the debts due by the estate, the executor or administrator shall render a final account and pray a settlement of his administration.

Executor's final account.

[Form No. 167, Appendix.]

§ 249. If he neglect to render his account, the same proceedings may be had as prescribed in this chapter, in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, shall apply to his account presented for final settlement.

Neglecting to render final account.

*Cases bearing upon the general subject of the preceding division of the Statute.*

If an executor or administrator, receive from the debtor, an allowance over and above the amount of the demand, for extra trouble in adjusting and settling it, he is not bound to account for it; and if he receive extra interest, he cannot be charged with it in his administration account. *Gordon v. West*, 8 New Hamp. R., 444.

But see Sec. 217, *ante*.

The time and expenses of an executor in procuring an injunction upon a fraudulent judgment against the estate, may be allowed. *Evarts v. Mason*, 11 Verm., 122.

The fact that an executor or administrator has charged a gross sum in his account for personal services, furnishes no legal reason for rejecting the charge *in toto*. *Ib*.

An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him, for a debt owing by intestate, cannot set off such judgment. *Hills v. Tullman*, 21 Wend., 674.

On an application for leave to issue execution upon a judgment against an executor for costs, in defence of a proceeding instituted by an executor, the latter sought to off-set, a judgment against the applicant, recovered by C. B. and assigned to the executor: *Held*, that as the judgment for costs, was in terms against the executor in his representative capacity, it must abide the course of distribution of the estate. The judgment purchased by the executor, belongs to him individually. To authorize a set-off, the debts must be mutual, and must be due to and from the same persons in the same capacity; and it is against sound policy to permit executors to buy up claims against creditors of the deceased, for the purpose of obtaining a set-off in equity. *Dudley v. Griswold*, 2 Bradford's R., 24.

Executors may be allowed for their expenses in the management of the estate; but the charges must be reasonable. If necessary, an agent may be

employed at the expense of the estate. *Glover v. Holley*, 2 Bradford's R., 291.

An administrator will be allowed for expenses of communicating intelligence of the death of the deceased to his family; for all necessary charges attending his interment, and for his own traveling expenses. *Hasler v. Hasler*, 1 Bradford's R., 248.

If an agent has been necessarily employed in the collection of the rents of leasehold estate by the executors, his commissions may be allowed; but if the executor has himself performed the service, he can only receive his regular statutory commissions. *Fisher v. Fisher*, 1 Bradford's R., 335.

Reasonable repairs and improvements, enhancing the value of the property, may be made by an executor, upon leasehold estate, occupied by the legatees or parties in interest, etc. *Ames v. Downing*, 1 Bradford's R., 321.

On an accounting, the Surrogate has jurisdiction to try every question necessary to the settlement of the accounts. The legatees can adduce evidence to charge the executor with more assets than he acknowledges to have received; and it is competent for him, on the other hand, to show in defence, that the assets were his own property, and not part of the testator's estate, at the time of the death. *Merchant v. Merchant*, 2 Bradford's R., 432.

Where partnership property has come into the hands of an administrator, he is no further accountable than for the share of the deceased in the partnership assets, after payment of all the liabilities, and a full settlement of all the partnership accounts. *Montgomery v. Dunning*, 2 Bradford's R., 220.

The administrator of a surviving partner, stands in the same position as the surviving partner in his life time, and although he has the legal title to the partnership effects, yet they are assets of the firm, and not of his intestate, and should neither be inventoried nor accounted for, as property of his intestate. *Thomson v. Thomson*, 1 Bradford's R., 24.

An executor who is also named as a trustee in a will, though not entitled to commissions in each capacity, shall have his full commissions both for receiving and paying out, on the final settlement of his account as executor. *Mann v. Lawrence*, 3 Bradford's R., 424.

Interest will be charged against the executor if he mix the funds of the estate with his own, and make use of them. *Olgivie v. Olgivie*, 1 Bradford's R., 356.

An administrator having the funds of the estate in cash for six years, not showing that the money was kept in bank, or otherwise, ready, to be paid over, and not explaining the delay in closing the estate: *Held*, that he was chargeable with interest on the presumption of use of the funds. *Hasler v. Hasler*, 1 Bradford R., 248.

An administrator will be chargeable with interest accruing on claims against the estate, which have been approved, if he have funds, and neglect to take proper steps to have them applied to the discharge of the claims. *Finley v. Carothers*, 9 Texas R., 517.

Although a claim be an open account, it bears interest from the date of its approval; the allowance and approval, being a judgment. *Ib.*

A settlement in the probate court is a final settlement, but a complainant who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court, and compel the administrators to a full account, disregarding the proceeding or settlement in the probate court. *Clarke v. Perry* 5 Cal. R., 58.

Administrators and executors are individually responsible for costs recovered against them in every case; but they shall be allowed them, in their ad-

ministration accounts, except when it appears that the action has been prosecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. R., 167.

An administrator is not responsible for a debt lost by mistake, where he acted in good faith, and under advice of counsel. *King v. Morrison*, 1 Penn., 188.

If an administrator sends wine belonging to the estate, abroad on speculation, and loses on it, he is responsible for the loss. *Callaghan v. Hall*, 1 Serg. & Rawles' R., 241.

He is also liable for the interest and costs of a debt which he refused to pay, when assets were in his hands. *Id.*

## CHAPTER XI.

### PARTITION AND DISTRIBUTION OF ESTATES.

§ 250. At any time subsequent to the third term of the probate court, after the issuing of letters testamentary or of administration, any heir, devisee, or legatee, may present his petition to the court, that the legacy or share of the estate to which he is entitled may be given to him, upon his giving bonds with security for the payment of his proportion of the debts of the estate.

Petition by heir or devisee for his portion of estate.

[Form No. 168, Appendix.]

§ 251. Notice of the application shall be given to the executor or administrator, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Notice of application.

[Forms No. 169 and 170, Appendix.]

§ 252. The executor or administrator, or any person interested in the estate, may appear and resist the application, or any other heir, devisee, or legatee, may make a similar application for himself.

Executor, etc., may resist application.

§ 253. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party or parties applying may be allowed to him or them, without injury to the creditors of the estate, the court shall make a decree in

Decree as prayed.

conformity with the prayer of the applicant or applicants : Provided, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the probate judge, and with sureties to be approved by him, payable to the executor or administrator, conditioned for the payment by the heir, legatee, or devisee, whenever required, of his proportion of the debts due from the estate.

[Form No. 171, Appendix.]

Decree may order whole or part of share of heir, etc., delivered. § 254. Such decree may order the executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof.

Where partition necessary. § 255. If in the execution of such decree, any partition be necessary between two or more of the parties interested, it shall be made in the manner hereinafter prescribed.

Costs. § 256. The costs of the proceedings authorized by the preceding section shall be paid by the applicant, or, if there be more than one, shall be apportioned equally amongst them.

Order for payment of bond. § 257. Whenever any bond has been executed and delivered under the provisions of the preceding sections, and the executor or administrator shall ascertain that it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, he shall petition the court for an order requiring the payment, and shall have a citation issued and served on the party bound, requiring him to appear and show cause why the order shall not be made. At the hearing, the court, if satisfied of the necessity of such payment, shall make an order accordingly, designating the amount, and giving a time within which it shall be paid. If the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Distribution of residue. § 258. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

[Forms No. 172, to 176, Appendix.]

§ 259. In the decree the court shall name the persons and the proportion or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession. Form of decree.

§ 260. The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper. On whose application decree made.

[Forms No. 172 and 173, Appendix.]

§ 261. When the estate, real or personal, assigned to two or more heirs, devisees, or legatees, shall be in common and undivided, and the respective shares shall not be separated and distinguished, partition and distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate judge, who shall be duly sworn to the faithful discharge of their duties, and the court shall issue a warrant to them for that purpose. Partition of estate in common.

[Forms No. 181 and 182, Appendix.]

§ 262. If the real estate shall be in different counties, the probate court may, if it shall judge proper, appoint different commissioners for each county; and in such cases the estate in each county shall be divided separately, as if there was no other estate to be divided; but the commissioner first appointed shall, unless otherwise directed by the probate court, make division of such real estate wherever situated within this state. Real estate in different counties

[Form No. 182, Appendix.]

§ 263. Such partition and distribution may be ordered on the petition of any of the persons interested; but before any partition shall be ordered, as directed in this chapter, notice shall be given to all persons interested who shall reside in this State, or their guardians, and to agents, attorneys or guardians, if there be any in this State, of such as reside out of the State either personally or by public notice as the probate court shall direct. Who may apply for partition, etc.

[Forms No. 178 and 179, Appendix.]

Partition may be made although some of the heirs etc., have parted with their interest.

§ 264. Partition of the real estate may be made as provided in this chapter although some of the original heirs or devisees may have conveyed their shares to other persons, and such shares shall be assigned to the person holding the same, in the same manner as they otherwise should have been to such heirs or devisees.

[Form No. 183, Appendix.]

Shares to be set out by metes and bounds.

§ 265. The several shares in the real and personal estate shall be set out to each individual in proportion to his right, by such metes and bounds, or description, that the same can be easily distinguished, unless two or more of the parties interested shall consent to have their shares set out, so as to be held by them in common and undivided.

[Forms No. 183 and 184, Appendix.]

Whole estate may be assigned to one on certain conditions.

§ 266. When any such real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to shares therein, who will accept it, always preferring the males to the females, and among children, preferring the elder to the younger : Provided, the party so accepting the whole shall pay to the other parties interested, their just proportion of the true value thereof, or shall secure the same to their satisfaction ; and the true value of the estate shall be ascertained by commissioners appointed by the probate court, and sworn for that purpose.

Payments for equality of partition.

§ 267. When any tract of land or tenement shall be of greater value than either party's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition, to either of the parties who will accept it, giving preference as prescribed in the preceding sections : Provided, the party so accepting shall pay or secure to one or more of the others such sums as the commissioners shall award, to make the partition equal, and the commissioners shall make their award accordingly ; but such partition shall not be established by the court until the sums so awarded shall be paid to the parties entitled to the same, or secured to their satisfaction.

[Form No. 183, Appendix.]

Estate may be sold and proceeds divided.

§ 268. When it cannot otherwise be fairly divided, the whole or any part of the estate, real or personal, may be



recommended by the commissioners to be sold ; and if the report be confirmed, the court may order a sale by the executor or administrator, or by an agent appointed for the purpose, and distribute the proceeds.

[Form No. 183, Appendix.]

§ 269. When partition of real estate among heirs or devisees shall be required, and such real estate shall be in common, and undivided with the real estate of any other person, the commissioners shall first divide and sever the estate of the deceased from the estate in which it lies in common, and such division so made and established by the probate court shall be binding upon all the persons interested.

[Form No. 183, Appendix.]

§ 270. Before any partition shall be made, or any estate divided as provided in this chapter, guardians shall be appointed for all minors and insane persons interested in the estate to be divided ; and some discreet person shall be appointed to act as agent for such parties as reside out of the State ; and notice of the appointment of such agent shall be given to the commissioners in their warrant ; and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they shall proceed to make partition.

[Forms No. 180, 182 and 183, Appendix.]

§ 271. The commissioners shall make report of their proceedings to the probate court in writing, and the court may for sufficient reasons set aside such report, and commit the same to the same commissioners or appoint others ; and the report, when finally accepted and established, shall be recorded in the records of the probate court, and a copy thereof, attested by the clerk under the seal of the court, shall be recorded in the office of the recorder of the county where the lands lie.

[Form No. 183, Appendix.]

§ 272. When the probate court shall make a decree assigning the residue of any estate to one or more persons entitled to the same, it shall not be necessary to appoint commissioners to make partition or distribution of such estate, unless the parties to whom the assignment shall be decreed, or some of them, shall request that such partition shall be made.

§ 273. All questions as to advancements made, or alleged to have been made, by the deceased to any heirs, may be heard and determined by the probate court, and shall be specified in the decree assigning the estate, and in the warrant to the commissioners, and the final decree of the probate court, or in case of appeal, of the district or supreme court, shall be binding on all parties interested in the estate.

[Form No. 183, Appendix.]

§ 274. When any estate shall be assigned by decree of the court, or distributed by commissioners, as provided in this chapter, to any person residing out of this State, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the partition and distribution.

[Forms No. 175, Appendix.]

§ 275. Such agent shall give a bond to the judge of probate, to be approved by him, faithfully to manage and account for such estate, before he shall be authorized to receive the same; and the court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

§ 276. When the estate shall remain in the hands of the agent unclaimed for a year, it shall be sold under the order of the court, and the proceeds, deducting the expenses of the sale, to be allowed by the court, shall be paid into the State treasury. When the payment is made, the agent shall take from the treasury duplicate receipts, one of which he shall file in the office of the controller, and the other in the probate court.

§ 277. The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale, as required in the preceding section, and may be sued thereon by any person interested.

§ 278. When any person shall appear and claim the money paid into the treasury, the probate court making the distribution, being first satisfied of his right, shall grant him a

certificate under its seal ; and upon the presentation of the certificate to the controller, he shall draw his warrant on the treasurer for the amount.

§ 279. When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up under the order of the court all the property of the estate to the parties entitled, the court shall make a decree discharging him from all liability to be incurred thereafter.

Decree discharging executor, etc.

[Form No. 185, Appendix.]

§ 280. The final settlement of an estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be subsequently discovered, or should it become necessary or proper from any cause that letters should be again issued.

Letters of administration may issue after such decree.

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## CHAPTER XII.

### REMOVAL OF EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

§ 281. Whenever the probate judge has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or has become incompetent to act, it shall be his duty, by an order entered upon the minutes of the court, to suspend the powers of such executor or administrator until the matter can be investigated.

Powers of executors, etc., may be suspended.

The power of the probate judge to remove in his discretion, an administrator for any of the causes named in the statute, will not be interfered with by the appellate court, unless it should be clearly shown that there has been a gross abuse of discretion. *Deck's Estate v. Gherke*, 6 Cal. R., 666.

§ 282. During the suspension of the powers of the executor or administrator, under the authority of the preceding section, the probate judge may, if the condition of the estate requires it, appoint a special administrator to take charge of the effects of the estate, who shall give bond, and account as other special administrators are required to do.

Special administrator may be appointed.

See sections 88 to 94, inclusive.

§ 283. When such suspension has been made, notice thereof shall be given to the executor or administrator, and he shall be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or if, appearing, the court be satisfied that there exists cause for his removal, his letters shall be revoked, and letters of administration granted anew, as the case may require.

Executor to have notice of his suspension, and to be cited to appear.

§ 284. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed. Such allegations shall be heard and determined by the court.

Any party interested may appear on hearing.

See Sec. 18, *ante*, and cases cited.

§ 285. If the executor or administrator has absconded, or conceals himself, or has removed from the county, notice may be given him of the pendency of the proceedings, by publication, in such manner as the court may direct; and the court may proceed upon such notice as if the citation had been personally served.

Executor, etc., absconding.

§ 286. In the proceedings authorized by the five preceding sections of this chapter, for the removal of an executor or administrator, the court may compel his attendance, by attachment, and may compel him to answer questions, on oath, touching his administration, and upon his refusal so to do may commit him until he obey.

Attachments to compel attendance.

## CHAPTER XIII.

### MISCELLANEOUS PROVISIONS.

§ 287. All orders and decrees made by the probate court, during its terms, shall be entered at length in the minute-book of the court; and also all orders which the probate judge is empowered to make out of term-time, and which are, by this act, specially required to be so entered. Upon the close of each term, the judge shall sign the minutes of the proceedings.

Orders, decrees,  
etc., to be entered.

§ 288. Whenever personal notice is required by this act to be given to any party to a proceeding in the probate court, and no other mode of giving notice is prescribed, it shall be given by citation, issued from the court, signed by the clerk, and under the seal of the court, directed to the sheriff of the proper county, and requiring him to cite such person to appear before the court or judge, as the case may be, at a time and place to be named in the citation. In the body of the citation shall be briefly stated the nature or character of the proceeding.

Personal notice  
how given.

[Forms No. 12, 46, 148, Appendix.]

§ 289. The officer to whom the citation is directed shall serve it by delivering a copy to the person named therein, or to each of them if there be more than one, and shall return the original to the court according to its direction, endorsing thereon the time and manner of service.

Citation, how  
served.

[Form No. 46, Appendix.]

§ 290. When no other time is specially prescribed, citation shall be served and returned at least five days before the return day thereof.

Time for service and return.

§ 291. Unless otherwise specially prescribed, the clerk of the probate court shall have power to administer all oaths necessary and proper to be taken, touching any matter pending in the probate court, or in any manner connected

Clerk of probate  
court may administer oaths,  
issue citations,  
etc.

with any proceedings of which the court has jurisdiction, and he shall have power to issue citations and subpoenas upon the application of any party, without the order of the judge, except in those cases in which such order is specially required by law for the issuing of a citation.

Process.

§ 292. All writs and processes issuing from the probate court shall be signed by the clerk and authenticated with the seal of the court, except subpoenas, which need not be under seal.

Practice.

§ 293. The practice in the district court shall be applicable to proceedings in the probate court, so far as the same does not conflict with any enactment specially applicable to the probate court, or is not inconsistent with the provisions of this act, or the act to provide for the appointment and prescribe the duties of guardians.

In what cases  
issues certified to  
district court.

§ 294. Issues of fact joined in the probate court, shall be certified by the probate judge to a district court of the same county for trial, on the application of any person interested in, or to be affected by, the decision thereof, in the cases following: 1st, on granting or revoking letters testamentary or of administration; 2d, on admitting a will to probate; 3d, on revoking the probate, or determining the validity of a will; 4th, on setting apart property, or making allowances for a widow or child; 5th, on application for the sale or conveyance of real property; 6th, on the settlement of an executor or administrator; 7th, on declaring, allowing, or directing the payment of a debt, legacy, claim, or distributive share of the estate. (a.)

[Forms No. 25, 26 and 164, Appendix.]

Manner of cer-  
tifying issues etc.

§ 295. A probate judge shall certify to a district court for trial, any issue of fact, mentioned in the preceding section, when a motion or application is made therefor, to the probate court, in the manner following: 1st, on motion made in open court after notice, and publication (if any is required) of the hearing or trial of the issue in the probate court, shall have been given and made according to law; an entry of which motion shall be made in the minutes; 2d, on filing a written notice with the clerk of the probate court,

(a.) Amended May 7, 1855. Statute 1855, p. 300, section 5; Original section Statute, 1851, p. 486; Compiled Laws, p. 420.

at any time within ten days after trial and decision therein, by the probate court, to the effect that the applicant requires the issue to be certified to a district court for trial ; *provided*, if said trial has been had since the first day of October, one thousand, eight hundred and fifty-four, said notice may be given at any time within thirty days after the passage of this act. (a.)

So much of this section as provides for the transfer to the district court of issues of fact already decided in the probate court, has been declared unconstitutional and void, upon the ground that its effect is, indirectly to confer appellate jurisdiction upon the district court.

See opinion in *Deck's Estate v. Gherke*, 6 Cal. R., p. 669.

§ 296. An issue certified by a probate court to a district court, shall be tried like any other issue of fact in the district court ; and at the trial, like objection and exception to the decisions of the court, may be taken and settled ; after the trial of such issue, the district court shall remit the proceedings upon such trial, together with the finding and decision, to the probate court, which shall form part of the record of the cause in the probate court. The probate court shall render judgment according to the finding and decision in the district court. (b.)

§ 297. An appeal may be taken to the supreme court, from an order, decree, or judgment, of the probate court, where the estate or amount in dispute, exceeds two hundred dollars, in the following cases : 1st, for or against granting or revoking letters testamentary or of administration ; 2d, for or against admitting a will to probate ; 3d, for or against the validity of a will, or revoking the probate thereof ; 4th, for or against setting apart property, or making an allowance for a widow or child ; 5th, for or against directing the sale or conveyance of real property ; 6th, on the settlement of an executor or administrator ; 7th, for or against declaring, allowing, or directing the payment of a debt, claim, legacy or distributive share. (c.)

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(a.) Amended May 7, 1855. Statute 1855, p. 300, Sec. 6 ; original section, Statute 1851, p. 487 ; Compiled Laws, p. 420.

(b.) Amended May 7, 1855. Statute 1855, p. 301, Sec. 7 ; original section, Statute 1851, p. 487 ; Compiled Laws, p. 421.

(c.) Amended May 7, 1855. Statute 1855, p. 301, Sec. 8 ; original section, Statute 1851, p. 487 ; Compiled Laws, p. 421.

§ 298. The appeal may be taken within sixty days after the order, decree, or judgment is made and entered in the minutes of the court; it shall be made by filing with the clerk of the probate court, a notice stating the appeal from the order, decree or judgment, or some specific part thereof, and by executing an undertaking, or giving surety on such appeal in the same manner, and to the same extent as upon an appeal to the supreme court from the district court; *provided*, the appeal of an executor or administrator, who has given an official bond, shall be complete and effectual without the undertaking; *provided, also*, from an order, decree or judgment, made since the first day of October, one thousand eight hundred and fifty-four; the appeal may be taken within sixty days after the passage of this act. After the appeal is determined, suit may be brought and prosecuted to judgment on the undertaking, in the name of any party beneficially interested therein. (a.)

Within what time taken.

How taken and perfected.

Undertaking by executor, when dispensed with.

Suit on undertaking.

§ 299. When a party, who has a right to appeal, wishes a statement of the case, to be annexed to the record, he shall prepare and file the same within twenty days after the entry of the order, decree, or judgment; *provided*, if the order, decree, or judgment, has been made since the first day of October, one thousand eight hundred and fifty-four, he shall prepare and file such statement within twenty days after the passage of this act. (b.)

Statement to be annexed to record.

§ 300. The provisions, as amended, of chapter one, title nine, of the act entitled "An act to regulate proceedings in civil cases, in the courts of justice in this State," passed April twenty-ninth, one thousand eight hundred and fifty-one, so far as the same do not conflict with the provisions of this act, shall be applicable to appeals from the probate court. (c.)

Provisions of the Practice Act made applicable, etc.

The provisions of the Practice Act, referred to in the foregoing section, have either been declared unconstitutional, or have become inoperative by the amendments to sections 295 to 301, inclusive. Compare sections 363 to 365, inclusive, of the Practice Act, and sections 295, 296, 297, 298 and 300, *ante*.

(a.) Amended May 7, 1855. Statute 1855, p. 301, Sec. 9; original section, Statute 1851, p. 487; Compiled Laws, p. 421.

(b.) Amended May 7, 1855. Statute 1855, p. 301, Sec. 10; original section, Statute 1851, p. 487; Compiled Laws, p. 421.

(c.) Amended May 7, 1855. Statute 1855, p. 302, 11.



§ 301. When an issue is certified for trial, the clerk of the probate court shall transmit all papers and records necessary for the trial of the issue, to the district court. After such trial, the clerk of the district court shall return the same with the proceedings of the court to the probate court. (a.)

Papers, etc.  
necessary for trial  
to be sent to  
district court, etc

See Sec. 314, *post*.

§ 302. Where it is not otherwise prescribed by law, the probate court, or the supreme court on appeal, may, in its discretion order costs to be paid by any party to the proceedings, or out of the estate, as justice may require; execution for the costs may issue out of the probate court. (a.)

Costs.

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## CHAPTER XIV.

### PUBLIC ADMINISTRATORS. (b.)

[The following five sections are taken from the act of April 15, 1855, "Concerning the office of public administrator, and making it elective." Compiled Laws, p. 846.]

§ 302 A. [Sec. 1.] There shall be elected at the general election in and for each of the counties of this State, by the electors thereof, a public administrator, who shall continue in office for the term of two years, and until his successor is elected and qualified. (c.)

Public admin-  
istrator. His elec-  
tion and term of  
office.

§ 302 B. [Sec. 2.] Before entering upon the duties of his office, he shall execute a bond, with sureties to be approved by the probate judge, in a sum not less than thirty thousand dollars, and which may at any time be increased, in the discretion of the probate judge, conditioned for the faithful performance of all the duties enjoined upon him by law, and

To execute bond.

Condition and  
amount.

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(a.) Amended, Statute 1855, p. 302, Secs. 12 and 13.

(b.) See cases noted at the end of the chapter.

(c.) Amended by act of April 4, 1854. Statute 1854, p. 27. The original section did not fix the *term* of the office.

particularly that he will account for, and pay over, all moneys and property that may come into his hands as such public administrator; *provided*, that the probate judge may in his discretion, for good reason shown, fix the amount of the bond to be given by the public administrator, at any sum, not less than fifteen thousand dollars. (a.)

Discretion of Judge as to am't.

Sec. 2 of the act "Concerning the office of public administrator for the county of San Francisco," (Compiled Laws, p. 848,) fixed the bond of the public administrator for that county, at the sum of fifty thousand dollars. That act was passed March 8, 1851. The act "Concerning the office of public administrator," etc., was passed April 15, 1851; and the former act would seem to be repealed, by the effect of sections 1 and 10 of the latter.

See Sec. 302 A., *ante*, and observation under section 302 E., *post*.

Duties and compensation.

§ 302 C. [Sec. 3.] He shall perform such duties, and receive such compensation, as may be prescribed by law.

Not to be interested or associated in business, etc.

§ 302 D. [Sec. 4.] No public administrator now in office, or hereafter elected under this act, shall be interested, directly or indirectly, in expenditures of any kind, made on account of any estates of deceased persons; nor shall he be associated in business or otherwise, with any person who shall be so interested; and he shall annex to his report every six months, as required by this act, an affidavit taken before a county or district judge to that effect.

To make return under oath semi-annually.

Return to be published. Or posted.

Moneys unclaimed.

§ 302 E. [Sec. 5.] The public administrator, shall once in every six months, make to the probate judge, under oath, a return of all estates of deceased persons, which have come into his hands, the value of the same, the expenses, if any paid thereon, and the balance, if any, remaining in his hands; said return to be published six times in some newspaper in the county, or if there be no newspaper published in the county, then it shall be posted, legibly written, or printed, in the office of the county clerk of the county; and he shall, after a final settlement of the affairs of any estate, if there be no heir or heirs, or other claimant thereof, pay over to the county treasurer, to be by him paid into the State treasury, all moneys and effects in his hands, belonging to said estate; and in the event of all or any such

(a.) Amended May 7, 1855. Statute 1855, p. 299. The original section fixed the bond at "not less than thirty thousand dollars," to be increased (but not diminished) in the discretion of the probate judge. Compiled Laws, p. 847.

moneys and effects having escheated to the State, the same shall be disposed of as other escheated estates. (a.)

See act of May 4, 1852, "Concerning escheated estates," *post* sections 327 to 335.

The remaining sections of this act, of April 15, 1851, have been repealed or become inoperative. Sections 6, 7 and 8, were temporary in their object, and have been executed. Section 9, which provided that the district judge, of the district embracing the county in which a vacancy should occur in the office of public administrator, "should appoint some suitable person to fill the same," has been repealed. (Statute 1854, p. 27.) Sec. 10, which is the concluding section, repeals "All provisions of law conflicting with this act."

[The three following sections are taken from the act of May 18, 1853, "Requiring county treasurers, and public administrators to settle their accounts." Compiled Laws, p. 849.]

§ 302 F. [Sec. 2.] Public administrators in their respective counties are hereby required to settle and adjust their accounts, relating to the collection, care and disbursement, of money or property, belonging to the estates of deceased persons, with the county clerk, on the first Monday of each month. When to settle with county cl'k.

§ 302 G. [Sec. 3.] Such county treasurers and public administrators, for the purpose of making such settlement, shall make out a statement, under oath, of the amount of money or other property received preceding such settlement, and up to the period of such settlement, the sources from whence the same was derived, the amount of payment or disbursements, and to whom, with the amount remaining on hand; such statement shall be verified by the oath of such party to be a true and correct statement of the same. Statement under oath.  
Contents.

§ 302 H. [Sec. 4.] Any officer as aforesaid, failing or refusing to make such statement and settlement as aforesaid, shall, for the first offence, upon conviction thereof by a competent court, be deemed guilty of a misdemeanor, and punishable by a fine not less than fifty dollars nor more than five hundred dollars, and for the second offence, on conviction thereof, be liable in addition to such fine to be removed from office by the judgment of the court of sessions of such county. Penalty for violation.

§ 303. For any wilful misdemeanor in office, the public Penalty for misdemeanor in office.

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(a.) Amended May 7, 1855. Statute 1855, p. 299, Sec. 2; original section, Statute 1851, p. 206; Compiled Laws, p. 846.

administrator may be indicted and fined in any sum, not exceeding two thousand dollars, and removed from office.

Duty of person in whose house stranger shall die  
 § 304. Whenever any stranger or person without known heirs shall die intestate in house or premises of any other person, it shall be the duty of such person, or any one knowing thereof, to give immediate notice to the public administrator; and in default thereof he shall be liable to any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

Duty of public administrator thereupon.  
 § 305. He shall make a perfect inventory of all such estate taken into his possession, and administer an account for the same as near as circumstances will permit, according to the law prescribing the duties of administration, subject to the control and direction of the probate court.

The like.  
 § 306. If at any time letters testamentary or of administration be regularly granted on such estate to any other person, he shall, under the order of the probate court, account for, pay and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession.

Officers to give notice of waste.  
 § 307. It shall be the duty of all civil officers to inform the public administrator of all property and estate known to them, which is liable to injury or waste, and which by law ought to be in the possession of the public administrator.

Suits for property of decedents.  
 § 308. The public administrator shall institute all manner of suits and prosecutions that may be necessary to recover the property, debts, papers, or other estate of the person deceased.

Complaint for embezzling property, etc.  
 § 309. If the public administrator shall complain to the probate judge, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects to the possession of which said administrator is entitled in his official capacity, the judge may cite such person to appear before the probate court, and may examine him on oath touching the matter of such complaint.

Citation, etc., how enforced.  
 § 310. If the person so cited refuse to appear and to submit to such an examination, or to answer to such interroga-

tories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he shall submit to the order of the court; and all such interrogations and answers shall be in writing, and shall be signed by the party examined, and filed in the probate court.

§ 311. The probate court may, at any time, order the public administrator to account for and deliver all the money and property of any estate in his hands to the heirs or to the executors or administrators regularly appointed.

Public administrator may be ordered to account, etc.

§ 312. The public administrator shall render a yearly account to the county auditor of: First, a list of the estates which have come under his charge, the condition in which they are at the time of reporting, the disposition which has been made of any during the year. Second, the sums of money which have come into his hands, in each estate, and what disposition has been made of them, and the amount of his fees; which said amount shall be published in at least two journals of the State, one of which shall be in his own county, if there is one published.

To render a yearly account.

§ 313. The act entitled "An act to regulate the settlement of the estate of deceased persons," passed April twenty-second, eighteen hundred and fifty, is hereby repealed, but the validity of any proceedings heretofore had or commenced shall not be affected hereby.

[Former act repealed.]

§ 314. All other issues of fact, joined in the probate court, shall be disposed of in the same manner as is provided in section twenty of this act, for issues joined on application for probate of wills. (a.)

Other issues of fact.

See sections 294 to 296, and section 301, *ante*, as to issues in the probate court.

[Forms No. 25, 26 and 164, Appendix.]

§ 314 A. [Sec. 1.] The fees of public administrator, shall be four per cent. upon the amount of the estates administered by them, which per centage shall be the only compensation allowed for their services. (b.)

Compensation of public administrator.

(a.) This section was added to the Probate Act, by the act of April 23, 1855. (Statute 1855, p. 133, Sec. 5.) Its proper place, would seem to be after section 294.

(b.) Section 1 of Act of April 28, 1851, "Concerning the fees of public administrator," Statute 1851, p. 525.

*Cases bearing upon the subject matter of the preceding chapter.*

The public administrator is personally liable upon a contract made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract. *Dwinelle v. Henriquez*, 1 Cal. R., 387.

The intention of the 14th chapter of the act concerning the estates of deceased persons, seems to be that the public administrator should at once take possession of the estate of all persons dying without known heirs. *Beckett v. Selover*, 7 Cal. R., 215.

As to the right of the public administrator to take possession of any particular estate under the 304th and 305th sections, it would seem to be in virtue of his office, and he must deliver it up to the person showing himself entitled thereto. *Ib.*

It seems that the public administrator is entitled to administration upon all estates not otherwise administered. *Ib.*

And see Sec. 52, *ante*, and cases noted.

As the public administrator is required to give bond, and take the official oath, it seems to have been the intention of the statute to dispense with the bond and oath required of other administrators, in each particular case. *Ib.*

There must be a judicial grant of administration to the public administrator in each particular case. His commission, therefore, cannot prove that he is the regular administrator upon the particular estate; he must show a grant of administration, like any other administrator. *Ib.*

But where the court made a regular order that letters should issue to the public administrator, as no bond or oath was required as a condition precedent, the omission to issue the letters, is not fatal. *Ib.*

Being nearer of kin to the decedent, than any other person in the United States, does not give a right to administer; if the next of kin is not here, or is legally disqualified, the public administrator is entitled to administer. *The Pub. Admr. v. Wells*, 1 Paige, 347.

The public administrator has no power under the act relative to persons dying intestate, etc., to administer on goods shipped at a foreign port and arriving here *after the death* of the intestate. *Hammond v. McLea*, 2 Johnson's Ch. R., 493.

The act referred to in this case, provides "That whenever any person, not resident within this State, shall die intestate, leaving goods and chattels within the city of New York, and the widow or next of kin, residing in this State, should not within thirty days after citation, take out letters of administration, the same should be granted to the public administrator." Laws N. Y., Session 38, Ch., 157.

## CHAPTER XV.

### DESCENTS AND DISTRIBUTIONS.

[Act of April 13, 1850, to regulate descents and distributions.]

§ 315. [Sec. 1.] When any person, having title to any estate not otherwise limited by marriage contract, shall die intestate as to such estate, it shall descend and be distributed, subject to the payment of his or her debts, in the following manner : 1. If there be a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child. If there be a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his or her children, and to the lawful issue of any deceased child, by right of representation. If there be no child of the intestate living at his or her death, the remainder shall go to all of his or her lineal descendants ; and if all the said descendants are in the same degree of kindred to the intestate, they shall share equally, otherwise they shall take according to the right of representation. 2. If he or she shall leave no issue, the estate shall go in equal shares to the surviving husband or wife, and to the intestate's father. If he or she shall leave no issue, or husband or wife, the estate shall go to his or her father. 3. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister, by right of representation : *provided*, that if he or she shall leave a mother also, she shall take an equal share with the brothers and sisters. 4. If the intestate shall leave no issue, nor husband, nor wife, nor father, and no brother or sister living at his or her death, the estate shall go to his or her mother, to the exclusion of the issue, if any, of deceased brothers or

Descent of estates of intestates.

sisters. 5. If the intestate shall leave a surviving husband or wife, and no issue, and no father, mother, brother, or sister, the whole estate shall go to the surviving husband or wife. 6. If the intestate shall leave no issue, nor husband nor wife, and no father, mother, brother, nor sister, the estate shall go to the next of kin in equal degree: except, ing, that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors shall be preferred to those claiming through an ancestor more remote: *provided, however*, 7. If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die, under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation. 8. If, at the death of such child, who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to such child by inheritance from his said parent shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally, otherwise they shall take according to the right of representation. 9. If the intestate shall leave no husband or wife, nor kindred, the estate shall escheat to the State, for the support of common schools.

§ 316. [Sec. 2.] Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child; and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, or adopted him into his family; in which case such child and all the legitimate

Illegitimate  
children.



children shall be considered as brothers and sisters, and on the death of either of them, intestate, and without issue, the others shall inherit his estate, and he theirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother respectively, their rights in the estates of all the said children, as provided hereinbefore, in like manner as if all had been legitimate. The issue of all marriages deemed null in law, or dissolved by divorce, shall be legitimate.

This provision of the statute is in derogation of the common law, and must therefore be strictly construed. To entitle one to claim under it, the evidence adduced ought to be clear enough to exclude all except one interpretation. Nor do we, in deciding the case upon this ground, intend to intimate that any writing containing the evidence required would be sufficient to create an heir under the statute, where it appears upon the face of the instrument that there existed no such object or intention at the time it was made. Opinion in *Estate of Sandford*, 4 Cal. R., 12.

The issue of marriages, deemed null in law, are legitimated by the statute, without regard to the *grounds of nullity*, and are consequently endowed with all the rights of the legitimate issue. *Hartwell v. Jackson*, 7 Texas R., 576.

§ 317. [Sec. 3.] If any illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother, or, in case of her decease, to her heirs at law.

The same.

§ 318. [Sec. 4.] The degrees of kindred shall be computed according to the rules of the civil law, and kindred of the half blood shall inherit equally with those of the whole blood, in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors, shall be excluded from such inheritance.

Degrees of kindred, how computed. The half blood.

§ 319. [Sec. 5.] Any estate, real or personal, that may have been given by the intestate in his lifetime, as an advancement to any child, or other lineal descendant, shall be considered as a part of the estate of the intestate, so far as it regards the division and distribution thereof among his issue, and shall be taken by such child, or other lineal descendant, towards his share of the estate of the intestate.

Advancements.

§ 320. [Sec. 6.] If the amount of such advancement shall exceed the share of the heirs so advanced, he shall be excluded from any further portion, in the division and distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount so re-

The same.

ceived shall be less than his share, he shall be entitled to as much more as will give him his full share of the estate of the deceased.

What deemed  
advancements.

§ 321. [Sec. 7.] All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such, by the child or other descendant.

Value of adv't,  
how fixed.

§ 322. [Sec. 8.] If the value of the estate so advanced, shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment of the party receiving it, it shall be considered as of that value, in the division and distribution of the estate: otherwise, it shall be estimated according to its value when given, as nearly as the same can be ascertained.

When person  
advanced dies be-  
fore intestate.

§ 323. [Sec. 9.] If any child, or other lineal descendant so advanced, shall die before the intestate, leaving issue, the advancement shall be taken into consideration, in the division and distribution of the estate, and the amount thereof shall be allowed accordingly, by the representatives of the heirs so advanced, in the like manner as if the advancement had been made directly to them.

Inheritance of  
husband and wife  
from each other.

§ 324. [Sec. 10.] The provisions of this act, as to the inheritance of the husband and wife from each other, apply only to the separate property of the intestate.

Inheritance by  
representation.

§ 325. [Sec. 11.] Inheritance or succession "by right of representation," takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

[Act of April 19, 1856.]

Aliens may in-  
herit.

§ 326 [Sec. 1.] Aliens shall hereafter inherit, and hold by inheritance, real and personal estate, in as full a manner as though they were native born citizens of this, or the United States; *provided*, that no non-resident foreigner or foreigners, shall hold or enjoy any real estate situated within the limits of the State of California, five years after the time such non-resident foreigner or foreigners shall inherit the

Non-resident  
foreigners.

same ; but in case such non-resident foreigner or foreigners do not appear or claim such estate within the period in this section before mentioned ; then such estate shall be sold upon information of the attorney general, according to law, and the proceeds deposited in the treasury of said State, for the benefit of such non-resident foreigner or foreigners, or their legal representatives, to be paid to them by the treasurer of said State, at any time within five years thereafter, when such non-resident foreigner or foreigners, or their representatives, shall produce evidence to the satisfaction of the treasurer and controller of State, that such foreigner or foreigners, are the legal heirs to, and entitled to inherit such estate, which evidence, together with the joint order of the said treasurer and controller, shall be placed on file in the office of the treasurer, and shall be to him a voucher for any payments made by him under the provisions of this act ; and in the event that such non-resident foreigner or foreigners do not appear or claim said estate or proceeds, and produce said evidence within said extended term of five years, then said estate or proceeds, shall be and become the property of the State, and shall be by the treasurer of State, placed to the credit of the school fund.

The following cases are under the law as it stood before the passage of the foregoing section :

An alien cannot be deprived of his land, or of any rights incident to its ownership, by proof of his alienage in a collateral proceeding. *Ramiers v. Kent et al.*, 2 Cal. R., 558.

The estate purchased by an alien, does not vest in the sovereign, till "office found ;" until then, the alien is seized, and may sustain actions for injuries to the property. *Ib.*

The relation of landlord and tenant may exist, where the landlord is an alien non-resident, and is obligatory upon the tenant, and he cannot be allowed to controvert the title of the lessor. *Ib.*

An alien may hold real estate against every one, and even against the government, until office found. *The People ex rel. ; The Attorney General v. Folsom*, 5 Cal. R., 373.

Laws regulating the admission of foreigners and aliens, and placing them under peculiar disabilities, and especially those relative to escheats, are political in their character. The policy of the government of the United States has been to encourage the immigration of foreigners, and to this extent a system of pre-emption has been adopted in all the territories, and new States, in which there is no discrimination between foreigners and native citizens. *Ib.*

Foreigners can hold property in all the territories, and may inherit, in the absence of legislation upon this subject. *Ib.*

By the civil law, as well as the common law, the King cannot take upon himself the possession of an estate said to have escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office. *Ib.*

The Mexican law of escheats did not remain in force in California, until the ratification of the treaty of Guadalupe Hidalgo; this law was abrogated by the conquest of the country by the Americans, so far as citizens of the United States and aliens were affected. *Id.*

## CHAPTER XVI.

### ESCHEATED ESTATES.

[Act of May 4, 1852, concerning escheated estates. Statute 1852, p. 103; Compiled Laws, p. 322.]

Estate of persons dying without heirs, etc., to escheat to the State.

§ 327. [Sec. 1.] If any person shall die, or any person who may have died within the limits of what is now the State of California, seized of any real or personal estate, and leaving no heirs, representatives or devisees, capable of inheriting or holding the same, and in all cases when there is no owner of such real estate capable of holding the same, such estate shall escheat to, and be vested in this State. (a.)

Duty of Attorney General in regard to escheated estates.

§ 328. [Sec. 2.] Whenever the attorney general shall be informed or have reason to believe that any real estate hath escheated to this State, by reason that any person hath died seized thereof, and hath left no heirs capable of inheriting the same, or by reason of the incapacity of the devisees to hold the same, or when he shall be informed, or have reason to believe, that any such estate hath otherwise escheated to the State, it shall be his duty to file an information in behalf of the State, in the District Court of the Judicial District in which such estate, or any part thereof is situated, setting forth a description of the estate, the name of the terre-tenant, and persons claiming such estate, if known, and the facts and circumstances in consequence of which said estate is claimed to have escheated, and alleging that by reason thereof the State of California hath right by law to such estate; whereupon such court shall award and issue a summons against such person or persons, bodies politic or corporate, alleged in such

(a.) Amended April 30, 1855. Statute 1855, p. 221, Sec. 1.

information, to hold, possess or claim such estate, requiring them to appear and show cause why such estate should not be vested in the State within the time allowed by law, in other civil cases, and the court shall make an order setting forth briefly the contents of said information, and requiring all persons interested in the estate, to appear and show cause, if any they have, within thirty days from the date of said order, why the same should not vest in this State ; which order shall be published at least one month from the date thereof, in a newspaper published in said district, if one be published therein, and in case no newspaper should be published in said district (by direction of the judge) in some other newspaper in this State. (a.)

§ 329. [Sec. 3.] All persons, bodies politic and corporate, named in such information as *terre-tenant*, or claimant to the estate, may appear and plead to such proceedings, and may traverse or deny the facts stated in the information, the title of the State to lands and tenements therein mentioned, at any time on or before the third day of the return day of the summons ; and any other person claiming an interest in such estate, may appear and be made a defendant, and plead as aforesaid, by motion for that purpose in open court, within the time allowed for pleading as aforesaid ; and if any person shall appear and plead as aforesaid, or shall refuse to plead within the time, then judgment shall be rendered that the State be seized of the lands and tenements in such information claimed. But if any person shall appear and deny the title set up by the State, or traverse any material fact set forth in the information, or issue or issues, shall be made up and tried as other issues of fact, and a survey may be ordered and entered as in other actions when the title or boundary is drawn in question ; and if after the issues are tried, it shall appear from the facts, found or admitted, that the State hath good title to the land and tenements in the information mentioned, or any part thereof, judgment shall be rendered that the State be seized thereof, and recover costs of suit against the defendants.

§ 330. [Sec. 4.] Any party who shall have appeared to any

proceedings as aforesaid, and the attorney-general in behalf of the State, shall respectively have the same right to prosecute an appeal or writ of error upon any judgment as aforesaid, as parties in other cases. (a.)

Disposition of  
moneys paid into  
treasury, and  
lands vested in  
state, etc.

§ 331. [Sec. 5.] The comptroller of State shall keep just and true accounts of all moneys paid into the treasury, all lands vested in the State, as aforesaid ; and if any person shall appear within ten years after the death of the intestate, and claim any moneys paid into the treasury, as aforesaid, as heir or legal representative, such person may file a petition to the district court in which the seat of government may be staying, stating the nature of his claim, and praying such money may be paid him ; a copy of such petition shall be served on the attorney general at least twenty days before the hearing of said petition, who shall put in answer to the same, and the court thereupon shall examine said claim, and the allegations and proofs ; and if the court shall find that such person is entitled to any money paid into the State treasury, he shall by an order, direct the comptroller to issue his warrant on the treasury for the payment of the same, but without interest or cost to the State ; a copy of which order, under the seal of the court, shall be a sufficient voucher for issuing such warrant ; and if any person shall appear and claim land vested in the State, as aforesaid, within five years after the judgment was rendered, it shall be lawful for such person (other than such as was served with a summons or appeared to the proceeding, their heirs or assigns) to file in the said district court, in which the lands claimed lie, a petition setting forth the nature of his claim, and praying that the said lands may be relinquished to him ; a copy of which petition shall be served on the attorney-general, who shall put in an answer, and the court thereupon shall examine said claim, allegations and proofs, and if it shall appear that such person is entitled to such land claimed, the court shall decree accordingly, which shall be effectual for divesting the interest of the State in or to the lands ; but no costs shall be charged to the State ; and all persons who shall fail to appear and file their petition, within the time limited as aforesaid, shall be forever barred ; saving, however, infants, married women, and persons of unsound mind, or persons be-

yond the limits of the United States, the right to appear and file their petition, as aforesaid, at any time within five years after their respective disabilities are removed : provided, however, that the legislature may cause such lands to be sold at any time after seizure, in such manner as may be provided by law ; in which case the claimants shall be entitled to the proceeds, in lieu of such lands, upon obtaining a decree or order as aforesaid.

[Act of April 30, 1855, amending and supplementary to the foregoing. Stat. 1855, p. 222, sections 4 to 8, inclusive.]

§ 332. [Sec. 4.] The said district court, upon the filing of said information and application of the attorney-general, Receiver may be appointed. either before or after answer, upon notice to the party or parties claiming such estate, if known, may, sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same, until the title to such real estate shall be finally settled.

§ 333. [Sec. 5.] Any person furnishing original information to the attorney-general of the escheating of any property to the State of California, together with the necessary evidence to sustain the action of the State in such behalf, shall be entitled to receive, upon the final recovery of such property, five per centum of the property so recovered ; provided that the amount so received by the person or persons furnishing such information, shall not in the aggregate exceed the sum of twenty thousand dollars in any one case ; and provided that only one person shall be entitled to compensation for such services. Informer entitled to per centage.

§ 334. [Sec. 6.] All moneys which have accrued, or may hereafter accrue to this State from escheated estates, shall be paid into the general fund, and if need be, [used] in the defrayment of the current expenses of the government, and the redemption of the controller's warrants. Disposition of moneys accruing from escheated estates.

§ 335. [Sec. 7.] The amount of such moneys, so received, shall be converted by the State controller into bonds of the State, bearing seven per cent interest per annum ; which bonds shall be kept as a special deposit in the treasury, marked " School Fund," to be credited to said school fund. The like.

All interest falling due on said bonds so set apart, shall be semi-annually placed to the credit of said school fund.

[Sec. 8 of this Supplementary Act merely declares that "All laws or parts of laws, in conflict with this Act," (sections 327 to 335 inclusive) "are hereby repealed."]

## CHAPTER XVII.

### THE APPOINTMENT AND DUTIES OF GUARDIANS. (a.)

[Act of April 19, 1860, to provide for the appointment and prescribe the duties of guardians. Compiled Laws, p. 164.]

§ 336. [Sec. 1.] The Probate Judge of each county, when it shall appear to him necessary or convenient, may appoint guardians to minors who have no guardian legally appointed by will, and who are inhabitants or residents in the same county ; or who shall reside without the state and have any estate within the county.

Guardians for  
minors, when ap-  
pointed.

[Forms Nos. 186, 187, 188, 189, 191, 192, Appendix.]

§ 337. [Sec. 2.] If the minor is under the age of fourteen years the Probate Judge may nominate and appoint his guardian ; and if he is above the age of fourteen years he may nominate his own guardian, who, if approved by the judge, shall be appointed accordingly.

Who to nomi-  
nate guardian.

§ 338. [Sec. 3.] If the guardian nominated by the minor shall not be approved by the judge, or if the minor shall reside out of the state, or if after being duly cited by the judge, he shall neglect for ten days to nominate a suitable

In what cases  
judge may ap-  
point, for minor  
over fourteen.

(a.) See cases noted at the end of this chapter.

And see the Act of March 13, 1868, "to authorize guardians of minors, etc., to receive and remove from this state any property to which the ward may be entitled;" *post* sec 386. Also, the act of April 10, 1868, "to provide for binding minors as apprentices, clerks and servants," *post* sec. 389. Also, the act of March 27, 1868, conferring certain powers upon the guardians of insane persons, having claims for lands derived from Spanish or Mexican authorities. Stat. 1868, p. 98.



person, the judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.

[Form No. 198, Appendix ]

§ 339. [Sec. 4.] When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor at any time after he attains that age may appoint his own guardian, subject to the approval of the Probate Judge.

Minor may nominate on arriving at age of fourteen

§ 340. [Sec. 5.] The father of the minor, if living, and in case of his decease the mother while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the guardianship of the minor.

Father or mother entitled to guardianship.

§ 341. [Sec. 6.] If the minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward.

If no father or mother.

§ 342. [Sec. 7.] Every guardian appointed as aforesaid shall have the custody and tuition of the minor, and the care and management of his estate until such minor shall arrive at the age of twenty-one years, or shall marry ; or until the guardian shall be discharged according to law.

W Powers of guardian.

See Statute of April 2, 1858, *post*. Sec. 407.

§ 343. [Sec. 8.] Before appointing any person guardian of a minor, the judge shall require of such person a bond to the minor, with sufficient sureties to be approved by the judge, and in such sum as he shall order, conditioned as follows : 1. To make a true inventory of all the estate, real and personal, of his ward, that shall come to his possession or knowledge ; and to return the same within such time as the judge shall order : 2. To dispose of and manage all such estate according to law, and for the best interest of the ward, and faithfully to discharge his trust in relation thereto ; and also in relation to the care, custody, and education of the ward : 3. To render an account on oath of the property, estate, and moneys of the ward in his hands ; and all proceeds or interest derived therefrom, and of the management and disposition of the same within one year after his appointment, and at such other times as the court shall di-

Bond of guardian.

Condition thereof.

rect : and 4. At the expiration of his trust to settle his accounts with the Probate Judge, or with the ward if he be of full age, or his legal representatives ; and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto.

[Form No. 190, Appendix.]

See next section, and sections 374 to 376 *post*, inclusive.

Sections of the  
Probate act made  
applicable to  
guardians.

And to bonds  
given by them.

§ 343. A. [Sec. 1.] All the provisions of sections seventy-eight, seventy-nine, eighty, eighty-one, eighty-two, eighty-three, eighty-four, eighty-five, eighty-six and eighty-seven of the Act entitled " An act to regulate the settlement of the estates of deceased persons, passed May 1st, eighteen hundred and fifty-one, are hereby declared to apply to guardians appointed in pursuance of the act, entitled " An act to provide for the appointment and prescribe the duties of guardians," passed April nineteenth, eighteen hundred and fifty, and to the bonds taken, or to be taken from such guardians in pursuance of said last mentioned act, and to the sureties on such bonds. (a.)

See sections 374, 375, 376, *post*.

Maintenance of  
minor out of in-  
come of his own  
property.

§ 344. [Sec. 9.] If any minor, who has a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case ; the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property in whole or in part, as shall be judged reasonable and shall be directed by the Probate Court ; and the charges therefor, may be allowed accordingly in the settlement of the accounts of his guardian.

Father may  
appoint a guar-  
dian.

§ 345. [Sec. 10.] The father of every legitimate child which is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time ; and every such testamentary guardian shall give bond in like

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(a.) This is a section supplementary to the Guardian act, and was passed March 27, 1857. Statutes of 1857, p. 120.

manner, and with like condition as herein before required ; and he shall have the same powers, and shall perform the same duties with regard to the person and estate of the ward, as a guardian appointed as aforesaid.

§ 346. [Sec. 11.] Nothing contained in this act shall affect or impair the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein ; nor to appoint or allow any person, as the next friend of a minor, to commence and prosecute any suit in his behalf.

Power of courts to appoint guardians and next friends not impaired.

§ 347. [Sec. 12.] Whenever it shall be represented to the Probate Judge upon petition, under oath, by any relative or friend of any insane person, or of any person who, by reason of extreme old age, or other cause, is mentally incompetent to manage his property, that such person is insane, or mentally incompetent to manage his property ; said Judge shall cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed ; and shall also cause such person, if able to attend, to be produced before him on the hearing.

Cases of persons alleged to be incompetent to manage their property to be investigated by Probate Judge.

[Forms No. 194, 195, Appendix.]

§ 348. [Sec. 13.] If after a full hearing and examination upon such petition, it shall appear to the Probate Judge that the person in question is incapable of taking care of himself, and managing his property, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

Probate Judge may appoint a guardian.

[Form No. 196, Appendix.]

§ 349. [Sec. 14.] Every guardian so appointed, as provided in the preceding section, shall have the care and custody of the person of his ward, and the management of all his estate, until such guardian shall be legally discharged ; and he shall give bond to such ward, in like manner, and with like conditions, as before prescribed with respect to the guardian of a minor.

Powers and duties of such guardians.

§ 350. [Sec. 15.] Every guardian appointed under the provisions of this act, whether for a minor or any other person, shall pay all just debts due from the ward, out of his personal estate, and the income of his real estate if sufficient ;

Guardian to pay debts due from,

and if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided by law.

§ 351. [Sec. 16.] Every such guardian shall also settle all And recover debts due to his ward. accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the Probate Judge, compound for the same, and give a discharge to the debtor, on receiving a fair and just dividend of his estate and effects ; and he shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose as guardian, or next friend.

§ 352. [Sec. 17.] Every guardian shall manage the estate Management of estate, etc. of his ward frugally, and without waste, and apply the income and profits thereof, as far as may be necessary for the comfortable and suitable maintenance and support of the ward, and his family, if there be any ; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order therefor, as provided by law, and shall apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward, and his family, if there be any. Sale of real estate.

§ 353. [Sec. 18.] The guardian may join in and assent to a partition of the real estate of the ward, in the cases and in the manner provided by law. Partition.

§ 354. [Sec. 19.] The guardian shall return an inventory of the estate of his ward, at such time as may be fixed by the Court ; the estate and effects comprised therein shall be appraised by three suitable persons, to be appointed and sworn in like manner as is required with respect to the inventory of the estate of a deceased testator, or intestate ; and every guardian shall account for and dispose of the personal estate of the ward in like manner as is directed with respect to executors and administrators. Inventory appraised, etc., and accounting by guardian.

See chapter iv. *ante*. As to accounting by Guardian, see section 370, *post*.

§ 355. [Sec. 20.] When the income of the estate of any person, under guardianship, shall not be sufficient to maintain the ward and his family, or to educate his family, or to educate the ward when a minor, his guardian may sell his real estate for that purpose, upon obtaining an order therefor, and proceeding therein as provided in this act. When income of ward insufficient etc., real estate may be sold.

§ 356. [Sec. 21.] When it shall appear to the satisfaction of the court, upon the petition of the guardian, that it would be for the benefit of his ward, that his real estate, or any part thereof, should be sold, and the proceeds thereof put out on interest or invested in some productive stock ; his guardian may sell the same for that purpose, upon obtaining an order therefor, and proceeding therein as hereinafter provided.

Other cases in which real estate may be sold.

[Form No. 197, 199, Appendix.]

§ 357. [Sec. 22.] If the estate is sold for the purpose mentioned in the twentieth section of this act, the guardian shall apply the proceeds of the sale to such purpose, so far as necessary ; and shall put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital shall be wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Disposition of proceeds of sale.

§ 358. [Sec. 23.] If the estate is sold for the purpose of putting out or investing the proceeds, as provided in this act, the guardian shall make the investment, according to his best judgment, or in pursuance of any order that may be made by the Probate Court.

The same.

§ 359. [Sec. 24.] To obtain an order for such sale, the guardian shall present to the Probate Court of the county in which he was appointed guardian, a petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale ; which petition shall be verified by the oath of the petitioner.

Petition for order of sale.

[Form No. 197, Appendix.]

§ 360. [Sec. 25.] If it shall appear to the court from such petition, that it is necessary, or would be beneficial to the ward, that such real estate or some part of it should be sold, the court shall thereupon make an order, directing the next of kin of the ward, and all persons interested in the estate, to appear before such court at a time and place therein specified, not less than four, nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate.

Order to show cause thereupon.

[Form No. 198, Appendix.]

**Order, how served.** § 361. [Sec. 26.] A copy of the order shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition ; or shall be published at least three successive weeks, in some newspaper printed in the county ; or if there be none printed in the county, then in such newspaper as may be specified by the court in such order.

**The hearing.** § 362. [Sec. 27.] The Probate Judge, at the time and place appointed in such order, or such other time as the hearing shall be adjourned to, upon proof of the due service or publication of the order, shall hear and examine the proofs and allegations of the petitioner, and of the next of kin, and all other persons interested in the estate who shall think proper to oppose the application.

**Examination of witnesses etc.** § 363. [Sec. 28.] On such hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the Probate Judge in the same manner and with like effect as in other cases.

**Costs.** § 364. [Sec. 29.] If any person shall appear and object to the granting of any order prayed for under the provisions of this act, and it shall appear to the court that either the petition or the objection thereto is unreasonable, said court may, in its discretion, award costs to the party prevailing, and enforce the payment thereof.

**Order of the court, if sales found necessary etc.** § 365. [Sec. 30.] If, after a full examination, it shall appear to the court either that it is necessary, or that it would be for the benefit of the ward, that the real estate or any part of it should be sold, such court may grant an order therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or for the education of the ward and his children ; or in order that the proceeds may be put out and invested.

[Form No. 199, Appendix.]

**Bond to be given by guardian on order for such sale.** § 366. [Sec. 31.] Every guardian authorized to sell real estate, as aforesaid, shall, before the sale, give bond to the Probate Judge, with sufficient security to be approved by such Judge, with condition to sell the same in the manner prescribed by law, for sales of real estate by executors and

administrators ; and to account for, and dispose of the proceeds of the sale, in the manner provided by law.

[Form No. 201, Appendix.]

§ 367. [Sec. 32.] He shall also give public notice of the time and place of sale, and shall proceed therein in like manner as prescribed in the case of a sale of land by an executor or administrator ; the same proceedings shall be had as to the return of the sale and the confirmation thereof, and the order to execute a conveyance, as is prescribed in regard to sales of land made by executors or administrators, and the confirmation shall have the same force and effect.

Notice of sale etc.

§ 368. [Sec. 33.] No order granted in pursuance of this act, shall be in force more than one year after granting the same.

Order to be in force one year.

§ 369. [Sec. 34.] No action for the recovery of any estate, sold by a guardian under the provisions of this act, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within three years next after the termination of the guardianship, excepting only that minors and others under legal disability to sue at the time when the cause of action shall accrue, may commence their action at any time within three years next after the removal of their respective disabilities.

Limitation of action to recover estate sold

§ 370. [Sec. 35.] The guardian shall, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the Probate Court for settlement and allowance ; and all the laws relative to the accounts of executors and administrators shall govern in regard to the accounts of a guardian, so far as they can be made applicable.

Accounting by guardian.

[Forms No. 166, 200, Appendix ]

§ 371. [Sec. 36.] The Probate Judges in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the Probate Judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and also any other money in his hands, in real estate, or in any other manner that shall be most to the interest of all concerned therein ; and the said Probate Court

Jurisdiction of probate Judge in reference to investment of property of minors.

may make such further orders, and give such direction as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian.

Removal, and  
resignation of,  
guardian.

§ 372. [Sec. 37.] When any guardian, appointed either by the testator or the Probate Judge, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor ; or shall have wasted or mismanaged the estate, the Probate Judge, after notice to the guardian, may remove him ; and every guardian may, upon request, be allowed to resign his trust, when it shall appear to the Probate Judge proper to allow the same ; and upon every such resignation or removal, and upon the death of any guardian, the Probate Judge may appoint another in his place.

Marriage of mi-  
nor.  
Guardian may  
be discharged etc

§ 373. [Sec. 38.] The marriage of any person who is under guardianship as a minor, shall terminate such guardianship ; and the guardian of any insane person, or other person, may be discharged by the Probate Judge when it shall appear to him, on the application of the ward, or otherwise, that such guardianship is no longer necessary.

New bond may  
be required,]  
Discharge of  
sureties.

§ 374. [Sec. 39.] The Probate Judge may require a new bond to be given by any guardian whenever he shall deem it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

Bonds to be fil-  
ed etc. how pros-  
ecuted for breach

§ 375. [Sec. 40.] Every bond given by a guardian, shall be filed and preserved in the office of the Clerk of the Probate Court of the county ; and in case of the breach of any condition thereof, may be prosecuted in the name of the ward for the use and benefit of such ward, or of any person interested in the estate.

Limitation of  
action against  
sureties.

§ 376. [Sec. 41.] No action shall be maintained against the sureties in any bond given by a guardian, unless it be commenced within three years from the time when the guardian shall have been discharged ; *provided*, that if at the time of such discharge, the person entitled to bring such action shall be under any legal disability to sue, the action may be commenced at any time within three years after such disability be removed.



§ 377. [Sec. 42.] Upon complaint made to the Probate Judge by any guardian, or by the ward, or by any creditor, or by any other person interested in the estate, or by any person having any prospective interest therein as heir, or otherwise, against any one suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or any instrument in writing belonging to the ward, the Judge may cite and examine such suspected person, and proceed with him as to such charge, in the same manner as is provided with respect to persons suspected of concealing or embezzling the effects of a deceased testator or intestate.

Complaint for concealing, embezzling, etc. property of ward

Compare Sec. 117, *ante*.

§ 378. [Sec. 43.] When any minor, or other person liable to be put under guardianship, according to the provisions of this act, shall reside without this state, and shall have any estate therein, any friend of such person, or any one interested in his estate in expectancy, or otherwise, may apply to the Probate Judge of any county in which there may be any estate of such absent person, and after notice given to all persons interested, in such manner as the Judge shall order, and after a full hearing and examination, if it shall appear to him proper, he may appoint a guardian for such absent person.

Guardian for non-resident minor.

§ 379. [Sec. 44.] Every guardian appointed under the provisions of the preceding section, shall have the same powers, and perform the same duties, with respect to any estate of the ward that shall be found within this state, and also with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this act.

Powers, etc. of guardian appointed under preceding section.

§ 380. [Sec. 45.] Every such guardian shall give bond to the ward, in the manner, and with the like condition, as hereinbefore provided with respect to other guardians, excepting that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, shall be confined to such estate and such effects as shall come to his hands in this state.

Bond of such guardian.

§ 381. [Sec. 46.] The guardianship which shall be first lawfully granted, of any person residing without this state,

Such guardianship to extend to

all the estate of the ward within the same ;  
 the State, etc. and shall exclude the jurisdiction of the Probate Court of every other county.

Expenses and compensation of guardian. § 382. [Sec. 47.] Every guardian shall be allowed the amount of his reasonable expenses, incurred in the execution of his trust, and he shall also have such compensation for his services, as the court in which his accounts are settled, shall deem to be just and reasonable.

More than one guardian may be appointed. § 383. [Sec. 48.] The court in its discretion, whenever the same shall appear necessary, may appoint more than one guardian of any person subject to guardianship, who shall give bond and be governed and liable in all respects as is provided respecting a sole guardian.

Account by joint guardians. § 384. [Sec. 49.] When an account is rendered by two or more joint guardians, the Probate Judge may, in his discretion, allow the same upon the oath of any of them.

Sales of real estate of minor heirs to be for cash, etc. § 385. [Sec. 50.] All sales of real estate of minor heirs, made for the benefit of said minor heirs, in accordance with the provisions of this act, shall be for part cash, and part deferred payments, not to exceed three years, bearing date from date of sale, as in the discretion of the probate judge, may be most beneficial to said minor heirs. Guardians making the sales aforesaid, shall demand and receive from the purchasers, bond and mortgage on the real estate so sold, with such additional security as the judge may deem necessary and sufficient, to secure the faithful payment of the deferred payments and the interest thereon. (a.)

[Act of March 13, 1858 To authorize Guardians of Minors, etc. to receive and remove from this State property to which the ward may be entitled. Statutes, 158, p. 59.]

When property of non-resident ward may be removed. § 386. [Sec. 1.] When the guardian and ward are both non-residents, and the ward is entitled to property in this state which may be removed to another state, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state of the residence of the ward, upon the application of the guardian to the judge of probate of the county in

(a.) This section is an addition to the original act; and was passed April 30, 1853. Stat. 1853, p. .

which the estate of the ward, or the principal part thereof, may be, in the manner following :

§ 387. [Sec. 2.] The guardian must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing that he has been appointed guardian of the ward, in the state in which he and the ward reside, and has qualified as such, according to the laws thereof, and gave bond with sureties, for the performance of his trust ; and must also give thirty days' notice to the resident executor, administrator, or guardian, if there be such, of the intended application ; thereupon, if good cause be not shown to the contrary, the probate judge shall make an order, granting such guardian leave to remove the property of his ward to the state or place of his residence, which shall be an authority to him, to sue for, and receive the same, in his own name, for the use and benefit of his ward.

Authority of  
the guardian  
must be proved.

§ 388. [Sec. 3.] Such order shall be a discharge of the executor, administrator, guardian, or other person, in whose possession such property may be at the time the order is made.

Effect of order.

[Act of April 10, 1858. To provide for binding Minors as apprentices, clerks, etc. Statutes, 1858, p. 134.]

§ 389. [Sec. 1.] Every minor, male or female, with the consent of the persons or officers hereinafter mentioned, may, of his or her own free will, bind himself or herself in writing, to serve as clefk, apprentice or servant, in any profession, trade, or employment ; if a male, until the age of twenty-one years, and if a female, until the age of eighteen years, or for any shorter time ; and such binding shall be as valid and effectual as if such infant was of full age, at the time of making such engagement.

Minors may  
bind with con-  
sent.

§ 390. [Sec. 2.] Such consent shall be given : *First*, by the father of the infant. If he be dead or be not in a legal capacity to give his consent, or if he shall have abandoned and neglected to provide for his family, and such fact be certified by a justice of the peace of the township or county, or sworn to by a credible witness, and such certificate or affidavit be endorsed on the indenture, then : *Second*, by the mother. If the mother be dead, or be not in a legal capacity to give such consent or refusal, then : *Third*, by the guardian of such

Consent to be  
given.

infant, duly appointed. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then : *Fourth*, by the supervisors of the county, or any two justices of the peace, or the judge of the probate court of the county.

**In writing.**      § 391. [Sec. 3.] Such consent shall be signified in writing, by the person entitled to give the same, by certificate at the end of or endorsed upon the indentures, and not otherwise.

**Executors.**      § 392. [Sec. 4.] The executors of any last will of a parent who shall be directed in such will to bring up his or her child to some trade or calling, may bind such child to service as a clerk or apprentice in like manner as the father might have done if living.

**Supervisors.**      § 393. [Sec. 5.] The supervisors of the county may bind out any child under the age above specified, who is or shall become chargeable to such county, to be clerks, apprentices, or servants, until they shall be of the ages above specified, which binding shall be as effectual as if such child had bound himself with the consent of his father.

**Town officer.**      § 394. [Sec. 6.] In every town or city, the presiding officer of the first council or legislative board thereof, if there be more than one, or any public officer or officers appointed to provide for the poor, may, in like manner, bind out any child, who, or whose parent or parents are, or shall become, chargeable to any such town or city.

**Age of minor.**      § 395. [Sec. 7.] The age of every infant so bound shall be inserted in the indentures, and shall be taken to be the true age without further proof thereof ; and whenever any public officers are authorized to execute any indentures, or their consent is required to the validity of the same, it shall be their duty to inform themselves fully of the infant's age.

**Money.**      § 396. [Sec. 8.] Every sum of money paid or agreed for, with or in relation to the binding out of any clerk, apprentice, or servant, shall be inserted in the indentures.

**Education.**      § 397. [Sec. 9.] The indentures shall also contain an agreement on the part of the person to whom such child shall be bound, that he will cause such child to be instructed to read and write, and to be taught the general rules of

arithmetic, or in lieu thereof that he will send such child to school three months of each year of the period of indenture.

§ 398. [Sec. 10.] The counterpart of any indentures executed by any county or city, or town officers, shall be by them deposited in the offices, respectively, of the clerk of any such county, city, or town.

Recorder.

§ 399. [Sec. 11.] Any white person capable of becoming a citizen of this state, coming from any other country, or state, or territory, may bind him or herself to service, if a minor, until his or her majority, or for any shorter term. Such contract, if made for the purpose of raising money to pay his or her passage, or for the payment of such passage, may be for the term of one year, although such term may extend beyond the time when such person will be of full age, but it shall in no case be for a longer term.

Allen minors.

§ 400. [Sec. 12.] No contract made under the last section shall bind the servant, unless duly acknowledged by the person making such contract, before some public magistrate or other officer authorized to administer oaths, and such acknowledgement certifying that the same was made freely on a private examination, be endorsed upon the contract.

Acknowledgment.

§ 401. [Sec. 13.] Nothing in this act shall concern, or in any manner affect or relate to Indians; and every person having one-half or more of Indian blood shall be deemed an Indian within the provisions of this act.

Indians.

§ 402. [Sec. 14.] Such indentures of apprenticeship may be annulled and declared void by any district court, or a judge thereof, or by a county court, or a judge of such court, in the county where the master, or person to whom such apprentice is bound, shall reside, upon satisfactory proof of either of the following named causes:

Indentures annulled.

*First*—Fraud in the contract of indenture.

First.

*Second*—When such contract is not made or executed in accordance with the provisions of this act.

Second.

*Third*—For willful non-fulfillment, by such master, of the provisions of such indenture.

Third.

*Fourth*—Cruelty or maltreatment of such apprentice, by the master, without just cause or provocation.

Fourth.

And in such case an account may be taken and adjusted

Account

by such court or judge for any services rendered by the apprentice for the master under the articles of such indenture ; and, in case such indenture shall be annulled, judgment may be given for such sum as may be found equitably due the apprentice, on account of any services so performed by him for such master.

Application for  
annulling.

§ 403. [Sec. 15.] For the purpose of annulling such contract of apprenticeship, and recovering for services as aforesaid, application shall be made, either in term-time or vacation, by such apprentice, or on his behalf, but always in his name ; which application shall be made by petition, verified by oath, stating the grounds on which such application is made, the amount claimed, if any, for such services, and praying for the relief demanded. Such petition shall be filed with the clerk of the court, who shall immediately issue a citation thereon, duly certified, stating the grounds of such application as set forth in the petition, and the relief sought thereby. The citation shall also designate the time and place for the hearing of the application, and shall be directed to such master, and shall require him to appear and answer such petition, at the time and place so designated, or in default thereof proof thereon will be heard in his absence, and such judgment as the right of the case will be rendered upon such petition ; such citation shall be served at least five days before the day appointed therein for the hearing as aforesaid, by such person or officer (in the same manner and with the like effect) as are authorized to serve summons in civil cases in courts of record. And on the day appointed for the hearing of the petition, such master may file his answer in writing, verified like the petition, setting forth any just cause why the prayer of the petitioner should not be granted ; and upon such pleadings, the court or judge in term-time or vacation, shall hear the proofs of the parties, who shall be styled plaintiff and defendant, as in civil cases in the same manner, and shall determine the case in all respects as chancery cases are tried and decided under the civil practice act, and may annul such indentures, and grant any remedy or relief provided in this act, either with or without costs. But no adjournment or continuance of the case shall be granted, for any cause, for a longer period than ten days for any one time, and the decision of such court or judge shall be final.

§ 404. [Sec. 16.] Any person held to service under the provisions of this act, and unlawfully departing and absenting himself or herself therefrom, upon the application of the master or mistress of such person, under oath, in writing, to the county judge of the county, that such person has absented himself or herself without permission, the judge may issue a writ reciting the substance of the affidavit, and commanding that such person be brought before him ; the writ may be served by any officer authorized to make arrests, and if, upon the person being brought before him, and upon an examination of the matter, he is satisfied that such person is legally held to service, and has absented himself or herself without just cause, he shall order the person held to service to return to the care and custody of the person lawfully entitled to such service or labor. If such person persist in refusing to return, or returning, immediately absent himself or herself without leave, such judge may order such person held to service to be confined in the county jail, station house, or house of refuge, for such time as he may deem proper, not to exceed one month ; or, at the instance of the master or mistress, may annul the indentures.

Punishment for  
flying from ser-  
vice.

§ 405. [Sec. 17.] Any person who shall aid, or assist, or encourage any person to run away, or harbor or conceal any person held to labor, knowing the same to be absent without leave of the master or mistress, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars.

Accomplices.

[Act of March 27, 1858. Conferring certain powers upon Guardians of Insane Persons. Statutes, 1858, p. 98.]

§ 406. [Sec. 1.] Whenever any insane person shall have any claim for lands derived from Spanish or Mexican authorities, and such claim shall have been rejected by the commissioners to ascertain and settle private land claims in the state of California, the guardian of such insane person, appointed or to be appointed by the probate court or judge, shall have power to employ counsel, on behalf of such insane person, and on such terms as he may deem to the best interest of his ward, to prosecute such claim on appeal before the district court or the supreme court of the United States ; and for that purpose he may sell and convey such portion of the land so claimed as may be necessary therefor, and to

Claim for lands.

Counsel.

meet any necessary expenses that may be incurred in the prosecution of such claim. The deed of conveyance by the guardian shall be approved by the district judge of the district in which the land is situated, by his approval in writing endorsed thereon, and shall be effectual to pass the estate of the said insane person in and to the land so conveyed ; *provided*, that any contract so made with counsel for the prosecution of any such appeal, shall be first approved by the judge of the district court of the district in which the land lies, upon petition duly presented for that purpose by the guardian ; *and provided, further*, no sale of land, for the purpose aforesaid, shall take place, without a similar approval by the district court aforesaid, upon a like petition of the guardian.

Deeds to be approved.

[Act of May 10, 1854. Fixing the age of majority ; as amended April 2, 1858. Statutes, 1858, p. 108.]

Legal age.

§ 407. [Sec. 1.] Males shall be deemed of full and legal age, when they shall be twenty-one years old, and females shall be deemed of full and legal age, when they shall be eighteen years old ; *or at any age under eighteen, when with the consent of the parent, guardian, or other person under whose care or government they may be, they shall have been lawfully married.*

Effect of Marriage with consent of guardian, etc.

The amendment of 1858 added that portion of the section in italics.

#### *Cases bearing upon the subject of the preceding Chapter.*

##### SELECTION AND APPOINTMENT OF GUARDIANS.

In selecting a guardian for an infant, the wishes of the nearest relatives, or the declared wishes of the deceased parents, will be considered ; but the matter is in the discretion of the Surrogate. *Cozine v. Horn*, 1 Bradford, 143.

Great respect will be paid to the wishes of deceased parents, even where they have not been expressed in a definite or legal form ; still it is the duty of the court to see whether the conclusions of the parents are well founded, and such as command approval. If there is no reasonable objection to the gratification of their wishes, they will be controlling. *Foster v. Mott*, 3 Bradford R. 409.

In determining upon the appointment of a guardian, the court will consider, not only what appears to be for the best interests of the infant, with reference to his or her temporary welfare, but the state of the affections, attachments, training, education and morals. *Ibid.*

As between an uncle and a stranger, contending for guardianship, other things being equal, the uncle is to be preferred. *Morehouse v. Cooke*, Hopkins, 226.

A convicted felon on being restored to civil life by pardon, is again entitled to the custody of his infant children, who had been placed under guardianship during his civil death. *Matter of Deming v. Johns*, 233, 483.



Other evidence than that furnished in the petition for the appointment of a guardian, concerning the property of the minor, may be required by the surrogate. He may ascertain by the examination of witnesses, the probable amount of the personal estate, and of the income of the realty, during the minority of the infant. *Bennett v. Byrne*, 2 Barb. Ch. R. 216.

A widow, being her late husband's executrix, her child's grandfather, will be appointed guardian, rather than he who has married the widow. *Mason-gale v. Tate*, 4 Hayw. 30.

#### ACCOUNTS OF GUARDIANS, ETC.

A guardian is bound to keep separate accounts with each of his wards, and is chargeable with interest, if he neglect to invest their funds, though he may keep a reasonable surplus on hand for contingencies. *Baker v. Richards*, 8 Serg. and Rawles, 12.

Transactions between a guardian and ward, during his minority, are alone the subjects of settlement in a guardianship account. *Crowell's Appeal*, 2 Watta, 205.

Where one gave a negotiable note as guardian, it was held that he was liable in his individual capacity after his guardianship ceased, and that he might indemnify himself out of the estate of his ward. *Thacher v. Dinsmore*, 5 Mass. R. 300, and *Foster v. Fuller*, 6 Mass. R. 58.

A guardian using the money of his ward, or neglecting to invest it, is chargeable with interest. A balance of the money in the guardian's hands should be struck every six months, and simple interest charged thereon, allowing a reasonable sum to remain in his hands to meet expenses. Commissions are not to be deducted from the foot of the account; but from time to time, as the services were rendered. *Lay v. Barnes*, 4 Serg. and Rawles, 112.

If the guardian neglects to put the ward's money at interest, but suffers it to be idle an unreasonable time, or mixes it with his own, the court will charge him with interest, and in cases of gross delinquency with compound interest. *White v. Parker*, 8 Barb. S. C. R. 48 and cases there cited.

As to proof of opportunity, or ability of guardian safely to invest ward's money, and what will be considered a reasonable time to do so; and the degree of diligence to which guardian is bound, see opinion in same case.

A guardian cannot be charged in his account with his ward, for a contested debt, claimed to have been due to the ward from him, at the time of his appointment. The surrogate has no jurisdiction to try such a controverted claim. *Rait v. Rait*, 1 Bradf. R. 345.

In allowing the guardian for counsel fees disbursed for the benefit of his ward, he will be credited only such sum as was a reasonable charge for the services rendered. *Ibid.*

When a guardian charges his ward with counsel fees paid by him, he must show that the services rendered by the counsel were necessary for the interest of the ward. *McGary v. Lamb*, 3 Texas R. 342.

The verdict of a jury on a question submitted to them, respecting the correctness of accounts, rendered by a guardian against his ward, is entitled to great weight, and should not be set aside, unless clearly and palpably against evidence. *Ibid.*

#### GUARDIANS FOR PERSONS NON COMPOS MENTIS.

Letters of guardianship of a lunatic, issued by a probate court, cannot be questioned in a collateral proceeding. *Warren et al v. Wilson*, 4 Cal. R. 310.

Upon the application for the appointment of a guardian to one represented as *non compos mentis*, the court are not confined to a trial by the inspection

and examination of such person, but may admit other evidence. *Brigham v. Brigham*, 12 Mass. R. 505.

The decree of a probate court appointing a guardian, is at least *prima facie* evidence of the disability of the ward. *White v. Palmer*, 4 Mass. R. 147.

A person under guardianship as *non compos mentis*, if his reason be restored, is competent to make a will, *although the letters of guardianship are unrevoked*, . *Stone v. Damon*, 12 Mass. R. 488.

Where a person *non compos mentis*, under guardianship, had in his possession a promissory note, payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, it was *held* that such payment was of no effect, and the letter of guardianship was held to be conclusive evidence that at the time of the payment the ward was not of sound mind. *Leonard v. Leonard*, 14 Pickering, 280.

Yet it seems, that the ward if of sufficient capacity *in fact*, may make a will, this being an act which the guardian cannot do for him. *Ibid*, Opinion of Court, p. 284.

#### MISCELLANEOUS.

A guardian's appointment by the proper officer, though without regular notice, is voidable, not void. *Cleveland v. Hopkins*, 2 Aik. 394.

Under the act of 1848 (Hart. Dig. p. 478), the appointment of a guardian by the chief Justice of any other county than that of the minor's residence, is absolutely void. *Munson v. Newson*, 9 Tex. R. 109.

The right to the guardianship of an infant cannot be determined upon *habeas corpus*. *People v. Mercein*, 8 Paige, 47.

The court will not order money of the infant to be paid to the father, or guardian by nature. He must procure an appointment and give security. *Genet v. Tallmadge*, 1 Johns. Ch. R. 3.

A father, or any one else, who takes possession of the personal property of an infant, receives the rents and profits of his real estate, may, in equity be considered, and compelled to account as guardian. *Van Epps v. Van Deusen*, 4 Paige, 64.

A guardian appointed out of the State, is not entitled to receive from an administrator here, the legacy or portion of his infant ward. The guardian must be appointed here, and give competent security, to be approved by the court, before payment of the infant's money to him will be ordered. *Morrell v. Dickey*, 1 Johns. Ch. R. 153.

The relation which a guardian maintains to his ward, is not that of a contract debtor to his creditor. Where he has received the money of his ward, the law will doubtless raise an implied promise to pay it over when the latter arrives at age, if he chooses to bring an action of assumpsit. But the guardian cannot by any act of his, change his duties and liabilities from those of a trustee to those of a mere contract debtor. *Seaman v. Duryea*, 10 Barb. S. C. R. 524.

A guardian is not liable for necessities furnished to his ward without his consent. *Cull v. Ward*, 4 Watts and Serg. 118.

## CHAPTER XVIII.

### WILLS. (a.)

[Act of April 10, 1850. Concerning Wills. Statutes, 1850, p. 177. Compiled Laws, p. 140.]

§ 408. [Sec. 1.] Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will, shall descend as the estate of an intestate, being chargeable in both cases with the payment of all the testator's debts. Persons over age of 18 may dispose of property by will.

§ 409. [Sec. 2.] Any married woman may dispose of all her estate by will, and may alter or revoke the will in like manner as a person under no disability might do : *provided*, that no such will, alteration, or revocation, shall be of any validity without the consent of the husband in writing, annexed to such will, alteration, or revocation, and attested and subscribed, and to be proven and recorded in like manner as a will is required to be witnessed, proven and recorded, unless the wife has power to make a will, conferred by marriage contract or authority in writing, executed by her husband before marriage. Married women may dispose of property by will.

§ 410. [Sec. 3.] No will, except such nuncupative wills as are mentioned in this act, shall be valid, unless it be in writing, and signed by the testator or some person in his presence, and by his express direction, and attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator. Wills — except certain, to be in writing, signed, and attested.

§ 411. [Sec. 4.] If the subscribing witnesses to a will are competent at the time of attesting its execution, their subse- Competency of subscribing witnesses.

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(a.) See cases noted at the end of the chapter. Also cases noted *ante*, pp. 33 and 34.

quent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved.

Gifts to sub-  
scribing witness-  
es void. § 412. [Sec. 5.] All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void, unless there are two other competent subscribing witnesses to the same, but a mere charge on the estate of the testator for the payment of debts, shall not prevent his creditors from being competent witnesses to his will.

Creditor; com-  
petent witness.

Witness who is  
a devisee and  
who would be en-  
titled to share of  
testator's estate  
if no will, entitled  
to share to am-  
ount of devise. § 413. [Sec. 6.] But if such witness, to whom any beneficial devise, legacy, or gift, may have been made or given, would have been entitled to any share of the estate of the testator, in case the will is not established, then so much of the share as would have descended or been distributed to such witness, as will not exceed the devise or bequest made to him in the will, shall be saved to him, and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Nuncupative  
wills. § 414. [Sec. 7.] No nuncupative will shall be good, when the estate bequeathed exceeds the value of five hundred dollars, nor unless the same be proved by two witnesses, who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid some one present to bear witness that such was his will, or to that effect, nor unless such nuncupative will was made at the time of the last sickness, and at the dwelling-house of the deceased, or where he or she had been residing for the space of ten days or more, except where such person was taken sick from home, and died before his or her return. Nothing contained herein shall prevent any soldier being in actual service, nor mariner being on shipboard, from disposing of his wages and other personal estate by a nuncupative will.

A nuncupative will cannot be sustained in any other cases than those prescribed in the statute. *Jones v. Norton*, 10 Texas R. 120.

Mere declarations of a person in good health, as to his wishes respecting the disposition of his property in case of his death, which he anticipated might occur suddenly—where the death did so occur soon afterwards—are not sufficient to establish a nuncupative will. *Ibid.*

§ 415. [Sec. 8.] No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof were reduced to writing within thirty days after they were spoken. Proof of nuncupative wills.

§ 416. [Sec. 9.] No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process be issued to call in the widow, or other person or persons interested, to contest the probate of such will, if they think proper. Probate of nuncupative wills.

§ 417. [Sec. 10.] No will in writing shall be revoked, unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it by the testator, or by some person in his presence, or by his direction, or by some other will or codicil in writing, executed as prescribed by this act, or by some other writing, signed, attested, and subscribed, in the manner provided by this act, for the execution of a will ; but nothing contained in this section shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator. Revocation of wills. Implied by law

§ 418. [Sec. 11.] If after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling, or revocation of such second will, shall not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancelling or revocation, the first will shall be duly republished. Antecedent not revived by revocation of subsequent will.

§ 419. [Sec. 12.] If after the making of any will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage contract, or unless she shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation, shall be received. Effects of marriage of a man on his will.

§ 420. [Sec. 13.] A will, executed by an unmarried woman, shall be deemed revoked, on her subsequent marriage, and shall not be revived by the death of her husband. Effect of marriage of a woman on her will.

§ 421. [Sec. 14.] A bond, covenant, or agreement, made by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for the specific performance, or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, if the same had descended to them.

§ 422. [Sec. 15.] A charge or incumbrance upon any estate, for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate which was previously executed, but the devise and legacies therein contained, shall pass, subject to such charge or incumbrance.

§ 423. [Sec. 16.] When any child shall have been born, after the making of its parent's will, and no provision shall be made for him or her therein, such child shall have the same share in the estate of the testator as if the testator had died intestate; and the share of such child shall be assigned as provided by law, in case of intestate estates, unless it shall be apparent from the will, that it was the intention of the testator that no provision should be made for such child.

§ 424. [Sec. 17.] When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceding section.

Whether it must appear from the will itself "that such omission was intentional," or may be shown by proof *aliunde*.—*Quære*.

The validity of a will must be tested by the proof of its original execution, and by its contents, without the aid of parol evidence as to the intention of the testator in respect to its subsequent ratification. *Ex parte, Lindsay*, 2 Bradford's R. 204.

But where a will is contested, as having been procured by undue influence, evidence of the conformity of its provisions with the testator's intentions, and declarations indicated to disinterested parties, is admissible. *Wightman v. Stoddard*, 3 Bradf. R. 393.

Facts and circumstances, as they existed at the time the will was made, may

be resorted to to aid in its construction, and in ascertaining the intention of the testator. *Smith v. Bell*, 6 Peter's R. 68. 11 Mass. R. 528. 8 Mass. R. 3. And see 1 Jarman on Wills, 362, and Wigram on Extrinsic Evidence, pp. 7 and 8.

§ 425. [Sec. 18.] When any share of the estate of a testator shall be assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same shall be first taken from the estate not disposed of by the will, if any; if that shall not be sufficient, so much as shall be necessary shall be taken from the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Share of after-born child—out of what part of estate to be paid.

§ 426. [Sec. 19.] If such child or children, or their descendants, so unprovided for, shall have had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing in virtue of the provisions of the three preceding sections.

Advancement during lifetime of testator.

§ 427. [Sec. 20.] When any estate shall be devised to any child, or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done, if he would have survived the testator.

Death of devisee, being relation of testator, in life time of testator, leaving lineal descendants.

§ 428. [Sec. 21.] Every devise of land in any will shall be construed to convey all the estate of the deviser therein, which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate.

Devises of land—how construed.

§ 429. [Sec. 22.] Any estate, right, or interest in lands acquired by the testator, after the making of his or her will, shall pass thereby, and in like manner as if it passed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator.

After-acquired property to pass by will.

Will made out  
of state subject  
to this act.

§ 430. [Sec. 23.] No will made in any other of the United States, or in any foreign country or state, shall be deemed valid as a will in this state, unless executed according to the provisions of this act.

Will includes  
codicil.

§ 431. [Sec. 24.] The term "will," as used in this act, shall be so construed as to include all codicils as well as wills.

*Cases bearing upon the subject of the preceding Chapter.*

The fact that a will was begun on one day, and finished several days afterwards, is, *it seems*, no ground for invalidating the will, under the Mexican law. *Castro v. Castro*, 6 Cal. 158.

The strictness of the rules of the civil law requiring five, or least three, witnesses to a will, was relaxed expressly in favor of remote districts. And by the customs of California, under the Mexican rule, which have the force of law, two witnesses were sufficient to a will. *Ibid.*

A will is regarded by the courts of England and the United States as a *conveyance*, and takes effect as a deed, on proof of its execution, unless there be some express statute requiring it to be probated. *Ib.* Opinion, at p. 161.

The will of a testator dying before the organization of the State Government, did not require to be probated, under the then existing laws. *Grimes' Estate v. Norris*, 6 Cal. 621.

Our statute of wills not only fails to require the probate of wills executed before its passage, but it must from its terms be concluded that the Legislature actually intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were made, and not disturbing rights which had grown up under the former system. *Ibid.*

A will only becomes executed upon the death of the testator, and therefore this construction does not affect wills *made before the passage of the statute, where the testator did not die till after its passage.* *Ibid.*

Property in this State, acquired by the husband after marriage, but before the passage of the Act of April 17, 1856, is common property under the Mexican law, as that acquired subsequently is by the statute, and cannot be disposed of by will. *Buchanan's Estate*, 8 Cal. R. 507.

A posthumous child, for whom no provision is made in the will of the father, is entitled (there being no other children) to one half of the separate and common property, where no express intention of the testator to the contrary appears. *Ibid.*

A revocatory clause in a will, of all former wills, is not always imperative. Its effect depends upon the intention to be gathered from all the instruments. *Van Wert v. Benedict*, 1 Bradf. R. 114.

In determining the construction of a will, the testator is presumed to have used words in their primary and ordinary sense. The word "children" includes only immediate, legitimate descendants, and not *step-children.* *Lawrence v. Hubbard*, 1 Bradf. R. 252.

Wills may be *conditional*, that is dependent for their testamentary operation upon a specified contingency. But the condition must appear upon the face of the will, and go to the root of the entire instrument, in order to affect the question of probate. *Ex-parte Lindsay*, 2 Bradf. R. 204.



## CHAPTER XIX.

### DISCONNECTED STATUTORY PROVISIONS RELATING TO THE ESTATES OF DECEASED PERSONS, ETC.

§ 432. The Revenue Act of April 29, 1857, provides that the property of widows, or orphan children, to the amount of \$1,000, shall not be subject to taxation. Taxation of property of widows and orphans.

Statutes, 1857, p. 326, sec. 2, subdivision 7.

§ 433. The undivided property of deceased persons may be listed to the heirs, guardians, executors, or administrators, as the case may be, and a payment of taxes made by either, shall bind all the parties in interest for their equal proportions. Undivided property of deceased persons.

Statutes, 1857, p. 329, last paragraph of section 6.

§ 434. Minor children, whose interest in lands has been sold under a tax sale, may redeem within one year after coming of age. Redemption by minors of lands sold for taxes.

Statutes, 1857, p. 334, sec. 23.

§ 435. It is hereby made the duty of every Probate Court, and Probate Judge, from time to time, to direct each and every executor and administrator (which directions may be either specially given in each case or by a general order) to pay out of the funds of the estate, all taxes that have attached to, or accrued, against such estate, after the passage of this Act, and no order or decree for the distribution of any property of any decedent among the heirs or devisees shall be made, until all taxes that have attached to, or accrued against the estate shall have been paid. Probate judge to direct paym't of taxes. No decree of distribution to be made, until taxes paid.

Statutes, 1857, p. 335, sec. 28.

§ 436. No estate shall be allowed to the husband, as tenant by courtesy, upon the decease of his wife, nor any estate in dower be allowed to the wife upon the decease of her husband. Husband and wife.

Act of April 17, 1850, defining the rights of husband and wife, sec. 10.

§ 437. Upon the dissolution of the community by the death of either husband or wife, one half of the common

Disposition of community property upon death of husband or wife. property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment.

*Ibid*, sec. 11.

Marriage contract by minor. § 438. A minor capable of contracting matrimony, may enter into a marriage contract, and the same shall be as valid as if he was of full age ; *provided*, it be assented to in writing, by the person or persons whose consent is necessary to his marriage.

*Ibid*, sec. 20.

No marriage contract to alter the order of descent, etc. § 439. The parties to any marriage contract, shall enter into no agreement, the object of which shall be to alter the legal order of descent, either with respect to themselves, in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, nor derogate from the rights given by law to the husband, as to the head of the family, or to the surviving husband or wife, as the guardian of their children.

*Ibid*, sec. 22.

Married woman may insure life of her husband, etc. § 440. It shall be lawful for any married woman, by herself or in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use, the life of her husband, for any definite period, or for the term of his natural life ; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claim of the representatives of her husband or his creditors ; but such exemption shall not apply where the amount of the premium annually paid, shall exceed three hundred dollars.

Statutes, 1854, p. 44.

The insurance may be made payable to her children. § 441. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable to her children, and shall be received by them ; or if under age, by their legal guardian for their use.

Statutes, 1854, p. 44.

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# APPENDIX OF FORMS.

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The following forms are in part selected from the files of the Probate Court of the County of San Francisco. Others are drawn from the statute for the purposes of the work, and are arranged with marginal references to the sections upon which they are based. The arrangement follows the general order of the statute.

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## NO. 1.

PETITION FOR PROBATE OF WILL IN THE COUNTY OF WHICH DECEASED WAS A RESIDENT AT THE TIME OF HIS DEATH. (§ 2.)

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To the Hon. the Probate Court [or the Probate Judge, § 12] of the city and county § 5, 12.  
of San Francisco, State of California :

Your petitioner, John Clay, of San Francisco, herewith presents to this court the § 5, 6.  
last will and testament of Henry Clark, deceased, and sheweth as follows :

That said Henry Clark died, in the county of Los Angeles in this State, on or about the fifth day of January, 1858, being at that time a resident of the city and county of San Francisco, and leaving real and personal estate of the value of ten thousand dollars.

That Mary W., the wife, and Alexander C., the father of the deceased, residents § 14.  
of this county, are the only heirs at law.

That John Black and Susan Black, minors, residing in the county of Sacramento, and the said wife and father of said deceased and your petitioner are the devisees under said will.

That your petitioner and Richard Ross are named therein as executors, and the said Richard Ross intending to decline said trust presents and files herewith his § 6.  
renunciation thereof.

Wherefore your petitioner prays that said will may be admitted to probate and letters testamentary issued to him, and that this Hon. Court would for that purpose § 6.  
appoint a day and order notice of the same to be given by publication, and that § 13.  
citations may issue to the heirs residing in this county and all other necessary and § 14.  
proper orders may be made in the premises.

And your petitioner will ever pray, etc.

April 12th, 1858.

JOHN CLAY.

NO. 2.

PETITION FOR PROBATE AND ISSUANCE OF LETTERS TESTAMENTARY.

To the Honorable Probate Judge in and for the county of San Francisco, State of California :

The undersigned respectfully submit herewith to this Honorable Court the last will and testament of Joseph Libby Folsom deceased, who at the time of his death was a resident of the county of San Francisco, State of California, and who departed this life on the nineteenth day of July, 1858, at the Mission of San Jose in this State ; and the undersigned pray that the said will be admitted to probate and that letters testamentary be issued to them as executors ; that a time be appointed for proving said will and that the proper orders in the premises be issued.

San Francisco, 24th July, 1855.

H. W. HALLECK,  
ARCH'D C. PEACHY,  
P. WARREN VAN WINKLE.

NO. 3.

PETITION FOR PROBATE OF WILL AND CODICIL.

IN THE MATTER OF THE ESTATE OF WILLIAM D. M. HOWARD, DECEASED.	} In Probate Court, State of California, County of San Francisco.
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The petition of Agnes Howard, Joseph P. Thompson, Henry F. Teschemacher and George H. Howard respectfully shows to this Court that heretofore, to wit, on the 19th day of January, A. D. 1856, the above named William D. M. Howard departed this life; that the said decedent at the time of his death was seized and possessed of certain real estate and other property situated in the said county of San Francisco and elsewhere; that previously to the time of his said death, to wit, on or about the eighth day of April, one thousand eight hundred and fifty-three, the said decedent then being at the city of San Francisco, made and published his last will and testament, wherein and whereby he appointed his wife, your petitioner, Agnes Howard, and your petitioners Joseph P. Thompson and Henry Teschemacher executors thereof, which said will is now on file in the office of the clerk of this court and to which your petitioners beg leave to refer, and that subsequently to the making of the said will and prior to the time of his said death, to wit, on or about the sixth day of June, one thousand eight hundred and fifty-three, the said decedent then being in the city and State of New York, made and published a codicil to his said will, wherein and whereby he appointed your petitioner George H. Howard an executor of said will with equal powers and in addition to the executors so afore-said named, which said codicil is now on file in the office of the clerk of this court and to which your petitioners beg leave to refer.

Your petitioners therefore pray that the said will and codicil may be admitted to probate, and that letters testamentary may be issued to them according to the provisions of the said will and codicil thereto, and pursuant to the statute in such cases made and provided.

Dated San Francisco, January 23, 1856.

LAKE & ROSE,  
Attorneys for Petitioners.

NO. 4.

RENUNCIATION OF TRUST BY EXECUTOR NAMED IN THE WILL. (§ 6.)

§ 6. IN THE MATTER OF THE ESTATE OF HENRY CLARK, DECEASED.	} Probate Court, City and County of San Francisco.
--	---

To the Hon. the Probate Court of the city and county of San Francisco :

The undersigned, Richard Ross, who is named as one of the executors named in the will of Henry Clark, deceased, respectfully shows to this court that it is his in-

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tention to decline the said trust as such executor, and he therefore renounces all claim or right thereto, and hereby declines said trust, relinquishing the same to and in favor of John Clay, who is also named therein as executor.

April 12th, 1858.

RICHARD ROSS.

### NO. 5.

PETITION FOR THE PROBATE OF A WILL IN THE COUNTY IN WHICH  
DECEASED MAY HAVE DIED, LEAVING ESTATE THEREIN AND NOT  
BEING A RESIDENT OF THIS STATE. (§ 2)

To the Hon. the Probate Court [or the Probate Judge, § 12] of the county of Sacra- § 5, 12.  
mento, State of California :

The petition of Albert Bull, of the city of Sacramento, respectfully sheweth— § 6.  
That John Porter died in this county on the first day of February last, leaving § 73.  
personal estate therein to the value of twelve thousand dollars or thereabouts.  
That said deceased was at the time of his death a resident of the State of Ken-  
tucky, at which place all the heirs of deceased reside, as your petitioner is informed  
and believes.

That said deceased left a will wherein your petitioner and Peter Thomas and § 5.  
James Rose are named as executors, which is herewith presented and filed in this  
court as the last will and testament of said John Porter deceased.

And your petitioner prays that the same may be admitted to probate and that § 6.  
letters testamentary thereon may be issued after proper hearing and proof, and § 13.  
for that purpose that a day may be appointed and due notice be given by publi- § 15.  
cation, and that citations issue to said executors [insert names of those executors  
residing in the county] and that all other orders be made and proceedings be had  
in the premises according to law.

Dated Sacramento, February 5th, 1858.

ALBERT BULL.

### NO. 6.

PETITION FOR PROBATE OF WILL IN THE COUNTY IN WHICH ANY  
ESTATE MAY BE, DECEASED HAVING DIED OUT OF THE STATE  
AND NOT BEING A RESIDENT THEREOF AT THE TIME OF HIS  
DEATH. (§ 2.)

To the Probate Court [or the Probate Judge, § 12] of El Dorado, State of Cali-  
fornia :

The petition of Abel Williams respectfully shows to this Court—

That your petitioner has received information of the death of Andrew Reed, a  
resident of the Territory of Oregon, who died at his residence in the said Territory  
on the tenth day of July, 1857.

That said deceased left a will in which, as your petitioner has learned within the § 5.  
last thirty days, he is named as one of the executors, and which is herewith pre-  
sented and filed in court.

That said deceased left estate in this county and in other counties of this State, § 3.  
but no application for letters testamentary upon said will has been made in any  
other county.

Wherefore your petitioner would humbly pray that said will may be admitted to § 6.  
probate and that letters testamentary thereon may be issued to him, and for such § 13.15  
purpose that a time be appointed and all persons interested be notified and cited as  
required by law, and that all other necessary orders in the premises be made by  
this Honorable Court.

ABEL WILLIAMS.

NO. 7.

PETITION FOR PRODUCTION OF WILL AND PROBATE WHERE THE WILL IS IN POSSESSION OF A THIRD PARTY. (§8.)

To the Honorable the Probate Court [or the Probate Judge, (§ 12] of the county of Monterey, State of California:

§ 2. The petition of Catharine Hall, of the county of Monterey, respectfully sheweth—  
That Joseph Hall, late a resident of this county, departed this life on or about the 15th day of January, 1858, leaving large and valuable estate, real and personal, in this and other counties of the State of California.

§ 10. That said deceased left a will in the hands of one William Hall, a brother of deceased, which is still in the possession of said William Hall, as is shown by the affidavit of Henry Cole annexed hereto, and has never been presented for probate.

§ 8. That your petitioner is the widow of said deceased and a devisee under the said will, and she therefore prays that the same may be produced and admitted to probate and that letters testamentary be issued to the proper parties, and for that purpose that the order of this court may be issued and served upon the said William Hall requiring him to produce the said will at such time and place as may be named by this court, and that all other necessary and proper orders be issued.

January 4th, 1858.

CATHARINE HALL.

NO. 8.

PETITION FOR ALLOWANCE AND RECORD OF A WILL PROVED AND ALLOWED IN ANOTHER STATE OR COUNTY. (§27.)

To the Honorable the Probate Court of the city and county of San Francisco:

§ 28. Your petitioner Nathan Sands herewith produces a copy of the will of Samuel Anson deceased, and the probate thereof duly authenticated, and alleges as follows:

§ 27. That the said Samuel Anson died in the State of Alabama in May, 1857; that his said will was duly proved and allowed in the Surrogate's court of the county of Westchester, State of California, on the tenth day of June, 1857, and letters testamentary thereon were issued to your petitioner who is named therein as executor. That said deceased left estate in the city and county of San Francisco, State of California, which has not been administered upon; and that said will is executed in conformity with the laws of this State.

§ 29. Wherefore your petitioner prays that said instrument may be allowed in this court and that said authenticated copy may be filed and recorded, and that said will may have the same force and effect as if it had been originally proved and allowed in this court, and that letters testamentary thereon be granted to your petitioner.

§ 28. That a day of hearing of this application be appointed and that due notice thereof be given by publication according to law.

NATHAN SANDS, Petitioner.

[ ANOTHER FORM. ]

NO. 9.

PETITION FOR ALLOWING AUTHENTICATED COPY OF WILL AND LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

IN THE MATTER OF THE LAST WILL  
AND TESTAMENT OF  
CHARLES L. CASE, DECEASED. }

Probate Court of  
San Francisco County.

§ 6, 58, To the Honorable the Probate Court of San Francisco county:

60. The petition of Robert C. Rogers, Public Administrator, sheweth—

That Charles L. Case departed this life in the town of Newburgh, county of Orange, in the State of New York, on or about the twenty-fifth day of March, A. D. 1857.

§ 2. That the said Case at and immediately before the time of his death was a resident of the State of New York; that said Case has left certain property, part of his es-

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tate, situated in the city and county of San Francisco aforesaid, to wit, one undivided half part of all that certain lot of land known and numbered on the official map of the city of San Francisco as Beach and Water Lot No. 252, and one undivided half part of a portion of Beach and Water Lot No. 251.

That said Case left his certain last will and testament duly executed in conformity with the laws of this State. That said last will and testament was duly proved and allowed in said state of New York, in the Surrogate's court of the county of Orange, and is now remaining in the Surrogate's office of said county in said State of New York. That your petitioner now presents to this Honorable Court a copy of said last will and of the probate thereof duly authenticated, and desires that the same may be allowed and recorded in this county aforesaid.

And your petitioner further shows that the said Case in and by his last will and testament, as will appear by reference thereto, nominated and appointed his brothers Robert L. Case and Augustus L. Case executors of his said last will and testament, and that the said executors are incapable of executing their said trust in said State of California, because the said executors Robert L. Case and Augustus L. Case, do not reside in the State of California and are absent from the said State, and do not intend to accept the said trust in the State of California, and have not presented the said will or any copy thereof to be admitted to probate in said State of California, and that no application has been made in the State of California for letters testamentary or of administration in this State, and your petitioner further shows that there are no heirs or kindred of the said Case residing in the State of California, or at present in the said State; that your petitioner is public administrator of San Francisco county.

Wherefore your petitioner prays that the said last will and testament of said Charles L. Case be allowed and admitted to probate in this Honorable Court, and that the said copy thereof may be filed and recorded herein with the same force and effect as if the said original will were here produced, and that letters of administration with the will annexed may be issued to your petitioner, after due notice according to law.

And your petitioner will ever pray, and so forth.

January 18th, 1858.

ROBERT C. ROGERS, Pub. Administrator.

§ 2.

§ 27.

§ 28.

§ 29.

58.

§60,13.

## NO. 10.

### PETITION TO ESTABLISH A LOST OR DESTROYED WILL. (§ 37.)

To the Honorable the Probate Court of the county of San Joaquin, State of California:

The petition of William Thorp respectfully sheweth—

That James Anderson then a resident of this county died on the 8th day of June last, leaving estate real and personal. That letters of administration upon his estate were granted to the public administrator of this county by this court on the 2d day of July, 1857.

That said deceased made a will which was in existence at the time of his death, [or "was fraudulently destroyed in his lifetime," as the case may be] wherein your petitioner was named executor, which has been lost [or "destroyed," as the case may be, stating the mode or cause] as appears by the affidavit of Sarah Anderson annexed hereto and made a part of this petition, and that the provisions of said will can be clearly and distinctly proved by Sarah Anderson and James Chase, two credible witnesses residing in this county.

Your petitioner would further state that said public administrator has made an application to this court for the sale of certain real estate, which under the terms of said will has been devised to the family of deceased, and there is sufficient other real estate belonging to said estate to pay the debts of deceased and all expenses of administration, without resorting to the property so devised.

Wherefore your petitioner prays that a day may be appointed for hearing this application and that due notice thereof may be given by publication according to law; that upon said hearing this court shall proceed to take proof of the execution and validity of the said will and to establish the same, and that upon the same being established the proper certificate of the provisions thereof under the hand and seal of this court may be made and recorded, and that your petitioner may be appointed executor of said will, and that letters testamentary thereon may be issued.

§ 38.

§ 37.

§ 40.

§ 18.

§ 37.

§ 39.

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§ 40.

to him, and that in the mean time the said administrator may be restrained from proceeding with the sale of said real estate or from any other acts which would be injurious to the legatees or devisees claiming under said lost [or destroyed] will.  
And your petitioner, as in duty bound, etc.

WILLIAM THORP.

STATE CALIFORNIA, }  
COUNTY OF SAN JOAQUIN, } ss.

William Thorp being duly sworn says that the matters set forth in the foregoing petition are true.

WILLIAM THORP.

Sworn before me, August 12th, 1857.

A. B., Notary Public.

### NO. 11.

#### ORDER OF PUBLICATION OF TIME APPOINTED FOR PROBATE OF WILL, &c.

IN THE MATTER OF THE ESTATE }  
OF } In Probate Court,  
HENRY CLARK, DECEASED. } City and County of San Francisco.

§ 13. On Reading and Filing the Petition of John Clay, praying for admission to Probate of a document filed herein, purporting to be the last Will and Testament of Henry Clark, deceased, and the issuance of Letters testamentary to the said petitioner.

§ 13. It is by the Court Ordered, That Monday, the 26th day of April, A. D. 1858, at eleven o'clock A. M., of said day be appointed for hearing said application; and that notice be given to all persons interested in said estate to be and appear at that time in the Probate Court Room, in the City Hall, in the City and County of San Francisco, and show cause, if any they have, why said document should not be admitted to Probate as the last Will and Testament of said deceased, and why letters testamentary should not be issued thereon to said John Clay, by publication thereof twice a week for two weeks previously to 26th day of April, 1858, in the San Francisco Herald, a newspaper printed and published in the City and County of San Francisco, [or, where there is no newspaper printed in the County, by posting notices in writing in three public places in this County.]

§ 13. It is Further Ordered, That Subpoenas issue to the subscribing witnesses to said Will and that Citations be served upon Mary W. Clark and Alexander C. Clark, heirs of the testator residing in this City and County to appear and contest the Probate of said Will at the time appointed as aforesaid, [and—where necessary, § 15—that citations issue to the co-executors named in said Will.]

Dated, San Francisco, April 12th, 1858.

Let the above order be entered.

M. C. BLAKE,  
County Judge, and Ex Officio, Judge of the Probate Court.

### NO. 12.

#### CITATION TO HEIRS AND PARTIES INTERESTED IN PROBATE. § 14.

IN THE MATTER OF THE ESTATE }  
OF } City and County of San Francisco,  
HENRY CLARK, DECEASED. } In Probate court.

The People of the State of California,

§ 288. To the Sheriff of the City and County of San Francisco, Greeting:

By Order of this Court you are hereby required to cite Mary W. Clark, and Alexander C. Clark, to be and appear in our Probate Court of the City and County of San Francisco, at the Court Room thereof at the City Hall in said city and county, on Monday, the 26th day of April, 1858, at 11 o'clock A. M., of that day, then and there to show cause, if any you have, why a certain instrument in writing presented to the said Probate Court, and now on file therein should not be admitted to



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Probate as the last Will and Testament of said deceased, and why letters testamentary thereon should not be issued to John Clay, one of the Executors named in said Will according to his petition on file, and make due return thereof.

§ 290.

[L. s.] Witness, the Honorable M. C. BLAKE, Judge of our Probate Court, at the City and County of San Francisco, this 12th day of April, A. D. 1858.

Attest:

WILLIAM DUEB, Clerk.

§ 288.

## NO. 13.

NOTICE FOR PUBLICATION OF TIME FOR PROVING WILL, &c., § 18.

IN THE MATTER OF THE ESTATE  
OF  
HENRY CLARK, DECEASED.

In the Probate Court,  
City and County of San Francisco.

Pursuant to an Order of this Court made this day, Notice is hereby given, That Monday, the twenty-sixth day of April, Anno Domini, 1858, at eleven o'clock, A. M., of said day, at the Court Room of this Court, at the City Hall, in the City and County of San Francisco, has been appointed for hearing the application of John Clay, praying that a document now on file in this Court, purporting to be the last Will and testament of Henry Clark, deceased, be admitted to Probate, and that letters testamentary be issued thereon to said John Clay, who is named therein as Executor at which time and place all persons interested therein may appear and contest the same.

San Francisco, April 12th, 1858.

WILLIAM DUEB, Clerk.

By D. P. BELKNAP, Deputy Clerk.

## NO. 14.

ORDER OF PUBLICATION OF TIME APPOINTED FOR ALLOWANCE OF WILL, &c., PROBATED IN ANOTHER STATE OR COUNTRY.—[§ 28.]

IN THE MATTER OF THE ESTATE  
OF  
JAMES W. CHEVER, DECEASED.

In the Probate Court of the  
City and County of San Francisco.

On reading and filing a document purporting to be an exemplified copy of the last Will and Testament of James W. Chever, deceased, with probate thereof in the Commonwealth of Massachusetts. § 28,

And on reading and filing the petition of F. A. Fabens, praying to be appointed Administrator with the Will annexed of said deceased, and that said Will be allowed as the Will of said deceased and be admitted to Probate in this Court. § 58.

It is hereby Ordered, That Monday, the 21st day of December next be appointed for the hearing of the application of said F. A. Fabens, and that notice thereof be given by publication in the Daily California Chronicle, a newspaper published in the City and County of San Francisco, twice a week, until the time appointed for hearing said petition, and that publication be likewise given by posting notices according to law.

November 30th, 1857.

T. W. FREELOON, County Judge.

[ANOTHER FORM.]

## NO. 15.

ORDER OF PUBLICATION OF TIME APPOINTED FOR ALLOWANCE OF WILL, PROBATED IN ANOTHER STATE OR COUNTRY, &c.

IN THE MATTER OF THE ESTATE  
OF  
CHARLES L. CASE, DECEASED.

In Probate Court,  
City and County of San Francisco.

On Reading and Filing the Petition of Robert C. Rogers, Public Administrator of the City and County of San Francisco, praying for admission to Probate of a document now on file in this Court, purporting to be an authenticated copy of the last

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Will and Testament of Charles L. Case, deceased, and of the Probate thereof, as admitted to probate in the Surrogate's Court of the County of Orange, in the State of New York, and that Letters of Administration, with the Will annexed, be issued to him.

It is by the Court Ordered, That Monday, the first day of February, A. D. 1858, at 11 o'clock, A. M. of said day, be appointed for hearing said application; and that notice be given to all persons interested in said estate to be and appear at that time in the Probate Court Room, in the City Hall, in the City and County of San Francisco, and show cause, if any they have, why the petition of said Rogers be not granted by publication thereof, twice a week, previously to said first day of February, in the San Francisco Herald, a newspaper printed and published in the City and County of San Francisco, and by posting notices according to law.

Dated, San Francisco, January 18th, 1858.

T. W. FREELON, County Judge.

### NO. 16.

#### NOTICE FOR PUBLICATION OF TIME FOR PROVING WILL, &c. (§ 13.)

IN THE MATTER OF THE ESTATE  
OF  
CHARLES L. CASE, DECEASED. }

In the Probate Court,  
City and County of San Francisco.

Pursuant to an Order of this Court made this day, Notice is hereby given, § 18, 28. That Monday, the eighth day of January, 1858, at eleven o'clock, A. M., of said day, at the court room of this court, at the City Hall, in the city and county of San Francisco, has been appointed for hearing the application of Robert C. Rogers, public administrator, praying that a document now on file in this court, purporting to be an authenticated copy of the last will and testament of Charles L. Case, deceased, as admitted to probate in the Surrogate's Court, Orange county, New York, be allowed as the will of said deceased, and be admitted to probate, and that letters of administration with the will annexed, be issued thereon to the said Robert C. Rogers, at which time and place all persons interested therein may appear and contest the same, and show cause if they can, why the prayer of the said Rogers should not be granted.

San Francisco, January 25th, 1858.

WILLIAM DUER, Clerk.

By D. P. BELKNAP, Deputy Clerk.

§ 17. STATE OF CALIFORNIA, } ss.  
CITY AND COUNTY OF SAN FRANCISCO, }

Robert White, of the city and county of San Francisco, being duly sworn, deposes and says, that he is the book-keeper in the office of the printer and publisher of the San Francisco Herald, a daily and weekly newspaper, published daily in the city and county of San Francisco; that a notice, of which the annexed is a printed copy, has been regularly published in the said paper, at least twice a week, for two weeks, commencing on the 29th day of January, 1858, and ending on the eighth day of February, 1858.

ROBERT WHITE.

Subscribed and sworn before me, this 8th day of February, 1858.

[L. s.]

WM. L. HIGGINS, Notary Public.

### NO. 17.

#### NOTICE FOR POSTING. (§ 60.)

STATE OF CALIFORNIA,  
CITY AND COUNTY OF SAN FRANCISCO. }

In Probate Court.

§ 60. Notice is hereby given, that Robert C. Rogers, public administrator, having filed in this court his petition praying for his appointment of administrator with the will annexed, of the estate of Charles L. Case, deceased, the hearing of the same has been fixed by said court, for Monday, the eighth day of February, 1858, at eleven o'clock, in the forenoon of said day, of the January term of 1858, at the court room thereof at the City Hall, in the city and county of San Francisco, and all persons interested

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in said estate are notified then and there to appear and show cause if any they have, why the said petition should not be granted.  
 San Francisco, January 26th, 1858.

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WILLIAM DUTER, Clerk.

By D. P. BELKNAP, Deputy.

STATE OF CALIFORNIA,  
 CITY AND COUNTY OF SAN FRANCISCO, } Probate Court.

§ 62.

D. P. Belknap, Deputy County Clerk of the city and county aforesaid, being duly sworn, says that on the 26th day of January, A. D. 1858, he posted three notices, of which the within is a copy, in three different public places in the city and county of San Francisco, one of which was the place at which the court is held, one at the U. S. Post Office, and one at the Hall of Records.

D. P. BELKNAP.

Subscribed and sworn to before me, this 26th day of January, 1858.

JAMES B. McMINN, Deputy County Clerk.

### NO. 18.

ORDER REQUIRING A PERSON HAVING POSSESSION OF A WILL TO PRODUCE IT. (§ 10.)

IN THE MATTER OF THE ESTATE }  
 OF } In the Probate Court of the County of Monterey,  
 JOSEPH HALL, DECEASED. } State of California, (or "In Chambers." § 12.)

It being alleged in the petition of Catharine Hall, widow of Joseph Hall, deceased, filed in this court, that a will of said Joseph Hall, is in the possession of one William Hall, a brother of deceased, and this court being satisfied ["from the affidavit of Henry Cole, accompanying the same," or "from the oath of the petitioner," or "from the showing made" or as the case may be,] that said allegation is correct,

It is hereby ordered, that the said William Hall produce the said will and file the same in this court within five days. [or "forthwith" or such time as the court may fix] from this day, and let a copy of this order be served upon said William Hall.

Monterey, January 4th, 1858.

W. H. RUMSEY, County Judge.

### NO. 19.

APPOINTMENT OF ATTORNEY FOR MINOR HEIRS AND PERSONS RESIDING OUT OF THE COUNTY. (§ 18.)

IN THE MATTER OF THE ESTATE }  
 OF } In Probate Court,  
 MARCELLUS FARMER, DECEASED. } City and County of San Francisco.

Application herein being made to admit to probate the last will and testament of said deceased, and it appearing to this court that there are minors and persons residing out of this county interested in said estate,

It is hereby ordered that W. B. Fleming, Esq., be and he is hereby appointed the attorney to represent said minors and said absent interested parties.

January 4th, 1858.

T. W. FREELON, County Judge.

*Note.*—This appointment may be made on presenting the petition for probate, or when entering upon the matter of the probate of the will.

### NO. 20.

CONSENT OF ATTORNEY FOR MINOR AND ABSENT HEIRS. (§ 18.)

IN THE MATTER OF THE ESTATE }  
 OF } In Probate Court,  
 MARCELLUS FARMER, DECEASED. } City and County of San Francisco,  
 January 4th, 1858.

I, W. B. Fleming, appointed by the court attorney to represent the minor heirs of Marcellus Farmer, deceased, and persons interested in said estate residing out of the city and county of San Francisco, appear on behalf of said heirs and others in-

terested as aforesaid, and consent that the document purporting to be the last will and testament of said deceased heretofore filed, be allowed and recorded herein, and be admitted to probate in this court as the last will and testament of the deceased, and that letters testamentary with said will annexed be issued to Egbert Judson and Henry P. Coon, according to the prayer of their petition,

W. B. FLEMING,

Attorney for minor heirs and persons interested resident out of the county of San Francisco.

NO. 21.

ORDER OF PROBATE OF WILL, WHERE THERE IS NO CONTEST, AND APPOINTMENT OF EXECUTOR. (§ 19.)

IN THE MATTER OF THE ESTATE } In Probate Court,  
OF } City and County of San Francisco.  
MARCELLUS FARMER, DECEASED. }

The petition of Egbert Judson and Henry P. Coon, heretofore filed in the above entitled matter praying for the admission to probate of a document purporting to be the last will and testament of said deceased, and to be appointed executors of the said estate, and that letters testamentary thereon be granted to petitioners this day regularly coming on to be heard.

§ 17. On reading and filing due proofs of the publication of the order to show cause why the prayer of the said petitioners should not be granted as aforesaid, and of the notice of the present hearing, and after examining ["Jacob Underhill, one of" § 19] the witnesses produced in behalf of said petitioners whose testimony has been reduced to writing and filed, from which it appears that said document is the last will and testament of said Marcellus Farmer, deceased, that it was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution and W. B. Fleming, the attorney appointed by the court to represent the minor heirs and persons residing out of this county, being present and consenting.

It is ordered that the paper heretofore filed purporting to be the last will and testament of Marcellus Farmer, deceased, be admitted to probate as the last will and testament of Marcellus Farmer, deceased, that Egbert Judson and Henry P. Coon be and they are hereby appointed [for "appointed" see §§ 47 and 50] executors and that letters testamentary thereon issue to the said petitioners without any bond being given for the faithful execution of their duties, the bond required by statute having been waived by the will of said testator [or "upon giving the bonds required by law for the faithful execution of the duties of their trust as such executors in the sum of ——— thousand of dollars with sufficient sureties, to be approved by the probate judge" or as the case may be, § 73.]

January 4th, 1858.

T. W. FREELON, County Judge.

NO. 22.

CERTIFICATE OF PROOF OF WILL. (§ 24.)

STATE OF CALIFORNIA, }  
CITY AND COUNTY OF SAN FRANCISCO, } ss.

I, Thomas W. Freelon, county judge of the city and county aforesaid, and ex-officio judge of the Probate Court thereof, do hereby certify:

That on the fourth day of January, A. D. 1858, the annexed instrument was admitted to probate as the last will and testament of Marcellus Farmer deceased, and from the proofs taken [or "from the facts found by the jury," § 24, as the case may be] and the examinations had therein, the said court finds as follows:

That Marcellus Farmer died on or about the 12th day of September, A. D. 1857, [in the county of \_\_\_\_\_, State of \_\_\_\_\_] that at the time of his death he was a resident of the city and county of San Francisco; that the said annexed will was duly executed by the said decedent in his lifetime, in the city and county aforesaid, in the presence of J. L. N. Shepard and Jacob

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Underhill, the subscribing witnesses thereto; also that he acknowledged the execution of the same in their presence and declared the same to be his last will and testament, and the said witnesses attested the same at his request in his presence and in the presence of each other; that the said decedent at the time of executing said will as aforesaid was of the age of twenty-one years and upwards, was of sound and disposing mind and not under restraint, undue influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath his estate.

In witness whereof I have signed this certificate and caused the same to be attested [SEAL.] by the Clerk of this court, under the seal thereof, this fourth day of January, A. D. 1858.

T. W. FREELON, County Judge.

Attest: WILLIAM DUEB, Clerk,

## NO. 23.

### ORDER OF PROBATE AND CERTIFICATE OF PROOF OF WILL AND TESTIMONY OF WITNESS. (§ 19, 24.)

In the Matter of the last Will and Testament ) In Probate Court, State of California,  
of ) County of San Francisco,  
Charles S. Hathaway, Deceased. ) January 25th, A. D. 1858.

This day coming on to be heard the petition of Edward F. Stone, praying for the admission to probate of a certain instrument in writing heretofore, to wit: on the eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, with said petition filed in the office of the clerk of this court as the last will and testament of Charles S. Hathaway (late of the city and county of San Francisco) deceased, for the issuance of letters of administration with the will annexed to George C. Waller, or such other person as the court shall appoint, and proof by affidavit being made and filed of the publication of notice as heretofore ordered by this court of the time and place set for hearing said petition and taking the proofs of said instrument, and one of the subscribing witnesses to said instrument being present and the testimony of Edward F. Stone, one of the subscribing witnesses, having been taken in open court and reduced to writing, and subscribed and sworn to by him, and it appearing by proof to the satisfaction of the court that A. L. Adams, the other witness, is now and has been for some time past absent from the State of California.

Robert C. Rogers, Esq., who was by the court appointed attorney for the minor heirs and persons residing out of the country interested in said estate, having entered his appearance with the clerk of this court and being then present, and no person appearing to oppose the said petition or the probate of said instrument, and it appearing to the satisfaction of the court that the said testator at the time of the execution of said instrument was of sound mind and not under restraint or undue influence or fraudulent misrepresentations, and that the said will was duly executed,

Now it is hereby ordered, that the instrument heretofore referred to and now attached to this order or certificate be and the same is hereby admitted to probate, and the same is hereby ordered to be, together with the testimony of said Edward F. Stone and this certificate recorded by the clerk of this court in the book provided for that purpose, entitled "Record of Wills," as the last will and testament of Charles S. Hathaway, deceased.

It appearing by proof to the satisfaction of the court that S. Griffiths Morgan, the executor, and Eliza Nye Hathaway, the executrix named in said instrument are now and have been for some time past absent from the State of California, and have not now any intention of returning to this State,

Now the court hereby makes, constitutes and appoints George C. Waller administrator of the estate of Charles S. Hathaway, deceased; and it is by the court further ordered that letters of administration with the will annexed be issued to George C. Waller, on his filing a bond approved by this court in the sum of one thousand dollars, conditioned for the faithful performance of his duties.

In witness whereof I, Thomas W. Freelon, county judge and ex-officio probate judge of said county, have in open court this the 25th day of January, A. D. [SEAL.] 1858, hereunto set my hand and caused the seal of the Probate Court of said county to be affixed.

T. W. FREELON, County Judge.

Attest: WILLIAM DUEB, Clerk,

By D. P. BELKNAP, Deputy Clerk.

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State of California, } In the Probate Court,  
County of San Francisco. } January 25th, 1858.

§ 23.

Edward F. Stone, being duly sworn, deposes and says, I reside in the city and county of San Francisco, am twenty-one years of age and upwards.

The instrument now shown me marked and filed in the probate court, January 11th, 1858, purporting to be the last will and testament of said deceased, was signed by me as a witness thereto, in the presence of the testator, and at his request, and in the presence of the other person whose name is subscribed thereto as a witness, he signed the same, as a witness in the presence of the testator, and at his request, and in my presence, and in the presence of each other, and the said Charles S. Hathaway, signed the same in our presence, and then and there declared the same to be his last will and testament.

At the time of making and signing the said instrument, the said Charles S. Hathaway, was of sound and disposing mind, and not under restraint or undue influence or fraudulent misrepresentations.

Mr. A. L. Adams, the other subscribing witness to said instrument, is absent from the State of California, and is now a resident of Chelsea, in the State of Massachusetts. The said will was left in my possession by the said Hathaway, when he departed from this state, on the 20th of April, A. D. 1857, as stated in my petition, for the probate of the will, now on file in the probate court.

EDWARD F. STONE.

Sworn and subscribed before me, in open court, this 25th day of January, 1858.

D. P. BELKNAP, Deputy County Clerk.

NO. 24.

POINTS OF OPPOSITION TO WILL. (§ 20.)

State of California, }  
City and County of San Francisco. } Probate Court.

In the Matter of the Estate of Robert Freeman.

And now comes Mary Freeman, and contests the supposed will now presented to this court for probate; and the said Mary Freeman says, that she is the widow of the said Robert Freeman, and interested in the estate left by the said Robert Freeman.

1st. And the said Mary Freeman further says: that the said supposed will, now offered for probate is not the last will and testament of the said Robert Freeman.

2d. That at the time of signing said will, said Robert Freeman was not of sound mind.

3d. That said supposed will was not signed by the said Robert Freeman, or by any person in his presence and by his express direction.

4th. That said supposed will was not attested by two or more competent witnesses subscribing their names thereto, in presence of the said Robert Freeman.

Therefore, the said Mary Freeman prays that probate of the said supposed will shall not be granted.

MARY FREEMAN.

NO. 25.

CONSENT THAT ISSUES UPON PROBATE OF WILL BE TRIED BY THE PROBATE COURT. (§20.)

IN THE MATTER OF THE LAST WILL AND TESTAMENT  
OF  
ROBERT FREEMAN, DECEASED. }

A document purporting to be the last will and testament of Robert Freeman, deceased, having been presented to this court for probate, and after due publication of notice thereof, and issuance and service of proper citations to the proper parties, and the matter now coming only regularly to be heard.

And the widow of said deceased appearing by her attorney, George G. Barnard, Esq., to contest said will, and having filed her statement in writing of the grounds of her opposition thereto, wherein and whereby certain issues of fact are joined, affecting the validity of said will, and which said issues are as follows:

1st. Was said Robert Freeman of sound mind at the time of the alleged execution of said will?

2d. Was the said will signed by the said Robert Freeman, or by any person in his presence and by his express direction?

3d. Was the said will attested by two or more competent witnesses subscribing their names thereto in the presence of said Robert Freeman?

Now, therefore, it is hereby stipulated and agreed by the said contestant, and by James Young, the executor named in said will, and the applicant for probate thereof, and by H. S. Brown, Esq., the attorney appointed by the Court to represent the minor heirs, and persons interested herein residing out of the county of San Francisco, that the said issues may be tried and determined by this court, a trial by jury and trial in the District Court, being expressly waived, and upon the trial and determination of said issues by this court, this court shall proceed to admit said will to probate or not according to the facts found by said court upon such trial, and according to the law.

San Francisco, January 10, 1857.

GEORGE G. BARNARD,

Attorney for the contestant, MARY FREEMAN, widow of deceased.

JAMES YOUNG, Applicant for Probate.

H. S. BROWN, Attorney for minor heirs and absentees, etc.

### NO. 26.

ORDER CERTIFYING TO THE DISTRICT COURT FOR TRIAL ISSUES OF FACT JOINED ON AN APPLICATION FOR PROBATE OF A WILL IN THE PROBATE COURT. (§ 294.)

IN THE MATTER OF THE LAST WILL AND TESTAMENT  
OF  
ROBERT FREEMAN, DECEASED.

In the Probate Court,  
City and Co. of San Francisco.

James Young having presented and filed in this court, a document purporting to be the last will and testament of Robert Freeman, deceased, in which he is named as executor, accompanied with his petition, praying that the same be admitted to probate as the last will and testament of said deceased, and the hearing of said application coming in to be heard on the day of 1857, the day appointed by this court therefor, after due notice thereof had been given by publication and citation according to the order of this court, and in accordance with the provisions of the statute in relation thereto, and Mary Freeman, the widow of said deceased, having duly appeared by her counsel to contest said will, and having filed her statement in writing of the grounds of her opposition; and H. S. Brown, appointed by this court as the attorney for the minors, and persons not residing in this county interested in the matter, being present and representing such parties, and the issues of fact arising upon such contest having been proposed by the several parties and settled by this court; and the said applicant having made motion in open court that said issues be certified to the District Court of the Fourth Judicial District, in and for the city and county of San Francisco, for trial, which said issues are in the form and rules following: Issue No. 1, etc., [as in preceding form.]

Now, therefore, it is hereby ordered, that the above issues of fact be certified as requested, and that the clerk of this court immediately transmit to the District Court of the Fourth Judicial District, in the city and county of San Francisco, the said will or document, and a copy of this order and of the petition of said applicant, and of the statement of grounds of opposition of said contestant, for the purpose of a trial of such issues of fact and the rendition of a special verdict thereon to be certified to this court for its further action in the premises.

By the Court.

T. W. FREELON, County Judge.

April 3d, 1857.

### NO. 27.

ORDER OF PROBATE OF WILL, WHERE THE SUBSCRIBING WITNESSES DO NOT RESIDE IN THE COUNTY. (§ 22.)

IN THE MATTER OF THE ESTATE  
OF  
ISAAC ROBERTS, DECEASED.

In Probate Court,  
City and County of San Francisco.

The petition of Joseph Scott, heretofore filed in the above entitled matter praying for admission to probate of a document purporting to be the last will and testa-

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- ment of said deceased, and to be appointed executor of the said estate, and that letters testamentary thereon be granted to said petitioner, this day regularly coming on to be heard.
- On reading and filing due proofs of the publication of the order to show cause why the prayer of the said petitioner should not be granted as aforesaid, and of the notice of the present hearing, and of service of the citation, issued herein by the order of the court; and after examining the witnesses produced in behalf of said petitioner whose testimony has been reduced to writing and filed; showing the sanity of the testator at the period of the alleged execution of said will and proving the due execution of said will by evidence of the handwriting of said testator and of the subscribing witnesses to said will, none of said witnesses residing or being present in this county, and W. W. Wiggins, Esq., the attorney appointed by the court to represent the minor heirs and persons residing out of this county, and interested herein, being present and consenting, and no one appearing to oppose.
- It is ordered, That the paper heretofore filed, purporting to be the last will and testament of said deceased be admitted to probate as the last will and testament of said deceased; that said Joseph Scott, be, and he is hereby appointed executor of said estate, and that letters testamentary issue to the said petitioner upon his giving the bond required by law for the faithful execution of the duties of his trust as such executor, in the sum of five thousand dollars.

ALEXANDER CAMPBELL,  
County Judge, and Ex Officio, Judge of the Probate Court.

#### NO. 28.

In the matter of the Probate of a paper writing,  
purporting to be the last Will and Testament  
of  
Marie Kranz, deceased, bearing date the 30th  
day of August, A. D. 1854, now on file in the  
office of the Clerk of said Court.

In Probate Court in and for  
the City and County of San  
Francisco, State of California.

On reading and filing the petition of William Bossell, duly verified, against the probate of a paper writing, purporting to be the last will and testament of Marie Kranz, deceased, the validity thereof, and the competency of the proofs on which the same was admitted to probate, On motion of William P. Hallett and S. H. Dwinelle, of counsel for said William Bossell,

It is ordered, That a citation issue, directed to Albert James and H. H. Byrne, Esq., attorney, appointed by said court to represent the interests of Frederick Allison, requiring them to show cause before said court, on Monday, the 18th day of January, A. D. 1858, at 11 o'clock, A. M., of that day, why the probate of said paper writing should not be revoked, and the same be declared not to be the last will and testament of Marie Kranz, deceased, and not the last will and testament of Marie Bossell, deceased; why the letters testamentary issued on said paper writing to Albert James, should not be revoked, and the said Albert James be compelled to surrender all property in his hands, or under his control, of which the said Marie died possessed, to the said William Bossell, and why the said Albert James should not be enjoined from disposing of said property or any part thereof, and from executing any sales or acquittances thereof, and why the said Albert James should not file a bond as required by law.

T. W. FREELON, County Judge.

Dated, January 11th, 1858.

#### NO. 29.

In the Matter of the Probate of paper writing,  
purporting to be the last Will and Testament  
of  
Marie Kranz, deceased, dated August 30th,  
1854, on file in said court.

Probate Court, San Francisco County,  
State of California.

Upon reading and filing the petition of William Bossell duly verified, On motion of William P. Hallett and S. H. Dwinelle, of counsel for said Bossell,

It is ordered, That Albert James, be, and he hereby is enjoined from proceeding further under the letters testamentary, issued to him by this court, on or about



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the 30th day of December, 1857, as executor of Marie Kranz, deceased, and that he desist and abstain from selling or disposing of the property in his possession or under his control, of which Marie Kranz or Marie Bossell died possessed, and from executing acquittances thereof, until further order of this court.

And it is also ordered, That the said Albert James show cause, on Monday, January 18th, 1858, at 11 o'clock, A. M., why he should not file an inventory of the property of which the said Marie died possessed.

And it is further ordered, That a copy of this order be forthwith served upon the said Albert James.

T. W. FREELON, County Judge.

Dated, San Francisco, January 11th, 1858.

## NO. 30.

### ORDER REVOKING PROBATE OF WILL. (§ 33.)

In the Matter of the Estate of Marie Kranz, Deceased.	}	In Probate Court, City and County of San Francisco.
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William Bossell having filed herein his petition in writing, containing his allegations against the validity of the document admitted to probate in this court, on the 4th day of January, 1858, as the last will and testament of Maria Kranz, deceased, for the purpose of contesting the validity of said will, and the probate thereof, and praying that the said probate of the said will be revoked, § 30.

And thereupon, the citation of this court being ordered and issued to A. James, the executor to whom letters of testamentary upon said will were issued, requiring him § 31.

to show cause why the probate of said will should not be revoked, and all other parties interested being properly cited, and the other necessary and proper orders in the premises being made; and now upon this 25th day of January, 1858, being the day appointed for that purpose, the said matter coming on for hearing, and due proof being made of the personal service of the said citations upon the parties therein named, and the said petitioner appearing by W. P. Hallett and S. H. Dwinelle, his counsel, and the said A. James, appearing in person, and by S. V. Smith, his counsel, the court proceeds to hear the proofs of the parties, and the same being fully heard, and it appearing therefrom that the said Maria Kranz, deceased, heretofore in her life-time to-wit: in the year 1840, intermarried with the said Bossell, in Germany, that said marriage relation was never severed or changed, except by her death, in December, 1857, that the said will was made by her, unbeknown to, and without the consent of the said William Bossell, her lawful husband, and while they were living separate and apart, in the year 1846, and under the pretence, name and circumstances of a single woman; § 32.

And it appearing to the court that the same was without any right or authority in law, and that the said will is invalid, null and void,

It is hereby ordered, adjudged and decreed, that the said probate of said will be declared to be, and the same is hereby annulled and revoked, and the letters testamentary therein issued to the said A. James, are cancelled. § 33.

And it is further ordered, That the fees and expenses of this proceeding, be paid by the said A. James, out of the property of said deceased. § 35.

T. W. FREELON, County Judge.

## NO. 31.

### OBJECTIONS TO THE GRANTING OF LETTERS TESTAMENTARY. (§ 34,42.)

In the Matter of the last Will and Testament of Jordan Smith, Deceased.	}	In the Probate Court of the County of Placer, State of California.
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Henry A. Mott, duly appointed by this court to represent the interests of minors and absent persons interested in the estate of said deceased, files his objections to the granting of letters testamentary to Peter Wyatt, who is named in the will of said deceased as one of the executors, as follows: § 18.

1st. That said Peter Wyatt is incompetent to execute the duties of the trust of executor of said will, by reason of improvidence and drunkenness. § 42.

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2d. [Or other reasons that may exist as specified in Sec. 42.]

And prays, that upon said will being probated, this Honorable Court will decree, that the application of said Peter Wyatt for letters, testamentary, be denied, and will make such further order as may be just and necessary in the premises.

HENRY A. MOTT, Attorney, &c.

NO. 32.

ORDER APPOINTING ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED ON THE DEATH OF THE EXECUTOR. (§ 45.)

In the Matter of the Estate }  
of } In Probate Court.  
Henry O. Park, Deceased. } City and County of San Francisco.

The petition of Ellen Park, widow of said deceased, praying for letters of administration, de bonis non, with the will annexed, upon the estate of said deceased, coming on to be heard; and due proof having been made to this court that the clerk had given notice thereof by causing notices to be posted up in at least three public places in the city and county,—one of which was at the place where the court is held—stating the name of the deceased, the name of the applicant, and the term of the court at which the application would be heard, the same having been given at least ten days before the hearing, and that the notice was in all respects according to law; and it being proved by the oath of the petitioner that John Park, the sole executor of said deceased, to whom letters testamentary were issued by the order of this court, on the day of 1857, died on the 10th day of February, 1858, leaving the administration of said estate unclosed and unsettled, and leaving estate of said deceased in this city and county, and within the jurisdiction of this court, and no person interested in said estate appearing to contest the application of the said petitioner, and it appearing that said Ellen Park is still unmarried, (§ 44,56,) and that the personal property of said estate is worth about \$2,500 (§ 73.)

It is ordered, that letters of Administration de bonis non, etc., and with the will of said deceased annexed, upon the estate of the said Henry O. Park, deceased, issue to said Ellen Park, upon her taking the oath and filing a bond according to law, in the sum of five thousand dollars.

T. W. FREELON,  
County Judge, and Ex officio, Judge of the Probate Court.

February 26, 1858.

NO. 33.

LETTERS OF ADMINISTRATION WITH WILL ANNEXED. (§ 50.)

State of California, City and County of San Francisco.

The last will of Charles L. Case, deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the city and county of San Francisco, and there being no executor named in the will residing in this state, and capable to act, Robert C. Rogers is hereby appointed administrator with the will annexed.

Witness: William Duer, clerk of the probate court, of the city and county of [SEAL] San Francisco, with the seal of the court affixed, the 12th day of January, A. D. 1858.

By order of the Court.

WILLIAM DUER, Clerk.

§ 72. State of California, City and County of San Francisco.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will faithfully discharge the duties of administrator with the will annexed of the estate of Charles L. Case, deceased, according to law.

ROBERT C. ROGERS.

Subscribed and sworn to [or "affirmed" as the case may be] before me, this 12th day of January, 1858.

JAMES B. McMINN, Deputy Clerk of the Probate Court.

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## NO. 84.

### LETTERS TESTAMENTARY. (§ 51.)

State of California, City and County of San Francisco.

The last will of Henry Clark, deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the city and county of San Francisco, John Clay, who is named therein, is hereby appointed executor.

Witness: William Duer, clerk of the probate court, of the city and county of [SEAL] San Francisco, with the seal of the court affixed, the 26th day of April, A. D. 1858.

By order of the Court.

WILLIAM DUER, Clerk.

State of California, City and County of San Francisco.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will faithfully discharge the duties of executor of the estate of Henry Clark, deceased, according to law. § 72.

Subscribed and sworn [or "affirmed" as the case may be] before me, this 26th day of April, 1858.

JOHN CLAY.

D. P. BELKNAP, Deputy Clerk of the Probate Court.

## NO. 85.

### PETITION FOR LETTERS OF ADMINISTRATION. (§ 58.)

To the Honorable, the Judge of the Probate Court of the city and county of San Francisco:

The petition of Sarah Mark, widow of said deceased, respectfully sheweth, that Harris Mark, died in the county of Alameda, State of California, on or about the 8d day of January, A. D., 1858. That said deceased, at, or immediately previous to the time of his death, was a resident of the city and county of San Francisco, State of California, and that he has left estate in this city and county, and within the jurisdiction of this court. [Vary this paragraph according to the circumstances under the provisions of section 2.] § 2.

That due search and inquiry have been made to ascertain if said deceased left any will and testament, but none has been found, and according to the best knowledge and belief of your petitioner, said deceased died intestate.

Your petitioner further shows that the estate of said deceased, so far as she has been able to ascertain the same, is of about the value of twenty thousand dollars, and consists of as follows: real estate in the city and county of San Francisco, of the value of \$15,000, or thereabouts; personal estate, stock in trade in the painting business—about \$3,000; notes, debts etc., about \$2,000; that the only heirs at law of said deceased, so far as known to your petitioner, are Charles, Sarah, and Mary Ann, minor children of said deceased. § 73.

Wherefore, your petitioner pray, that a day of court may be appointed for hearing this application, that due notice thereof be given by the clerk by posting notices according to law, and that upon said hearing, and the proofs to be adduced, letters of administration upon said estate may be issued to your petitioner. And your petitioner will ever pray, etc. § 60.

SARAH MARK.

Dated January 25th, 1858.

State of California, City and County of San Francisco: ss.

Sarah Mark, the above named petitioner, being duly sworn, says that she has read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be on information or belief, and as to those matters, she believes it to be true. § 65.

SARAH MARK. 97

Subscribed and sworn to before me this 25th day of January, 1858.

E. P. PRICKHAM, Notary Public. 97

NO. 86.

State of California,  
City and County of San Francisco. } In Probate Court.

Notice is hereby given, that Sarah Mark having filed in this court her petition, praying for letters of administration upon the estate of Harris Mark, deceased, the hearing of the same has been fixed by this court for Monday, the 8th day of February, 1858, at eleven o'clock, in the forenoon of said day of the January [in other counties it would be the "February"] term of 1858, at the court room thereof, at the city hall, in the city and county of San Francisco, and all persons interested in said estate are notified then, and there, to appear and show cause if any they have, why the said petition should not be granted.

San Francisco, January 25, 1858.

WILLIAM DUER, Clerk,  
By BENJAMIN E. BABCOCK, Deputy.

For form of "proof of posting," see No. 17.

NO. 87.

ORDER APPOINTING ADMINISTRATOR.

In the Matter of the Estate of  
Harris Mark, Deceased. } In Probate Court,  
City and County of San Francisco.

§ 60. The petition of Sarah Mark, widow of said deceased, praying for letters of admin-  
§ 62. istration upon the estate of said deceased, coming on regularly to be heard; and  
§ 68. due proof having been made to this court that the clerk had given notice thereof  
for this day, by causing notices to be posted up in at least three public places in the  
city and county,—one of which was at the place where the court is held—stating  
the name of the deceased, the name of the applicant, and the term of the court at  
which the application would be heard, the same having been given at least ten days  
before the hearing, and that the notice was in all respects according to law; and it  
being proved by the oath of the petitioner and of Henry Fuller, that the said Har-  
ris Mark, died on the 3d day of January, 1858, intestate, in the county of Alameda,  
of this state, and that he was a resident of the city and county of San Francisco at  
the time of his death, and has left estate in this city and county, and within the  
jurisdiction of this court, and no person interested in said estate appearing to con-  
test the application of the said petitioner, and his personal estate being shown to  
be of the value of \$5,000, or thereabouts.

§ 65. It is ordered, that letters of administration upon the estate of the said Harris  
§ 72. Mark, deceased, issue to said Sarah Mark, upon her taking the oath and filing a  
§ 73. bond according to law, in the sum of ten thousand dollars.

T. W. FREELON,  
County Judge, and Ex officio, Judge of the Probate Court.

February 8, 1858.

NO. 88.

BOND OF ADMINISTRATOR OR EXECUTOR. (§ 73.)

Know all men by these presents, that we, Sarah Mark, principal, and J. C. Horan and Edward Willett, sureties, are held and firmly bound to the State of California in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the State of California, for which payment, well and truly to be made, we bind ourselves, our heirs' executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of February, 1858.

The condition of the above obligation is such that whereas the above bounden Sarah Mark has been appointed administratrix of the estate of Harris Mark, deceased, by the order of the Probate Court of the city and county of San Francisco, State of California, of this date.

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Now therefore, if the said Sarah Mark shall faithfully execute the duties of her trust according to the law, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in the presence of }  
S. L. LUTPON. }

SARAH MARK. [Seal]  
J. C. HORAN, [Seal]  
EDWARD WILLETT, [Seal]

State of California, City and County of San Francisco, ss.

J. C. Horan and Edward Willett being duly sworn each for himself says that he is a freeholder resident in this State, and is worth the said sum of ten thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution. § 76.

Sworn before me, this 8th day of February, 1858. } J. C. HORAN,  
S. L. LUTPON, Deputy Clerk. } EDWARD WILLETT.  
(Indorsement.) Approved this 8th day of February, 1858.  
T. W. FREELON, County Judge.

## NO. 39.

### PETITION OF PUBLIC ADMINISTRATOR FOR LETTERS OF ADMINISTRATION. (§ 58.)

To Hon. T. W. Freelon, Judge of the Probate Court for the city and county or San Francisco :

The petition of the undersigned, public administrator of said city and county, represents that Isaac Levick, who was at and immediately preceding the time of his death resident of the city and county aforesaid, departed from the State of California for the city of New York and State of New York on the 20th day of August, A. D. 1857, that said Levick, on or about the day of September, 1857, left the port of Aspinwall, New Grenada, for said city of New York on board a steamship called the "Central America," that said steamship "Central America," on said voyage from Aspinwall as aforesaid, did, on or about the 12th day of September, A. D. 1857, founder or was sunk at sea, and that by said accident to, or sinking of said steamship the said Levick perished by drowning.

He further says that said deceased died intestate and has left within the State of California no heirs or relative entitled by law to apply for and receive letters of administration on said estate, and that said deceased has left valuable real and personal property situated and being in the said city and county of San Francisco.

Wherefore your petitioner prays that, by reason of the above recited facts, and the law in such case made and provided, letters of administration on said estate may be issued to him. And he will ever pray.

ROBT. C. ROGERS, Public Administrator.

San Francisco, November 9th, 1857.

## NO. 40.

### REMONSTRANCE AGAINST ISSUANCE OF LETTERS. (§ 61, 62.)

To the Honorable T. W. Freelon, Probate Judge:

Thomas Trounce, who holds a power of attorney from Isaac Levick, and has charge of all his business in San Francisco, and is a creditor of said Levick, feels it due to his friend to protest against granting administration on the estate of said Isaac Levick at the present time.

It is true that the said Levick left San Francisco on the 20th of August, intending to go through to New York, and if he did not change his mind he was on the ill-fated "Central America." Nothing has been heard of him since leaving San Francisco by his friends here, and it may be that he is lost, but it is respectfully submitted that there is neither evidence nor legal presumption of his death at present. He may not have sailed on the "Central America," or if on her he may have been saved and not yet heard from. If taken up by an outward bound vessel to Australia, to the East Indies, or even to California, it would not be known, unless that vessel had

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fallen in with some inward bound vessel within a few days after the accident and put him on board.

His business is not suffering and is placed in hands satisfactory to the owner, when he expected to be long absent, and his agent believes that it should so remain, without the expense of an administration, until we can hear from foreign ports. He would suggest that no action should be taken for at least six months.

The undersigned is informed and believes that the presumption of law is in favor of life, and that mere absence without being heard from must continue for seven years to rebut that presumption, and he is unable to see, in the absence of proof, that said Levick was on the "Central America," or if on her that he was not saved where many others were saved, how the legal presumption that he still lives is rebutted.

He therefore hopes that a reasonable time to hear from other places will be allowed before administering on his estate.

THOS. TROUNCE.

NO. 41.

ORDER FOR LETTERS AFTER OPPOSITION. (§ 62.)

STATE OF CALIFORNIA,  
CITY AND COUNTY OF SAN FRANCISCO. } In Probate Court.

In the Matter of the Estate  
of  
Isaac Levick. } Order Appointing Administrator.

The petition of Robert C. Rogers, public administrator, praying for letters of administration upon the estate of said deceased, coming on to be heard, and due proof having been made to this Court that the Clerk had given notice thereof by causing notices to be posted up in at least three public places in the city and county, one of which was at the place where the court was held, stating the name of the deceased, the name of the applicant and the term of the court at which the application would be heard, the same having been given at least ten days before the hearing, and that the notice was in all respects according to law; and the hearing of the same having been duly continued to this day, and it being proved by the oath of the petitioner and of S. Hubbard and A. C. Forbes that the said Isaac Levick died on or about the 12th day of September, 1857, at sea, and that he was a resident of the city and county of San Francisco at the time of his death, and has left estate in this city and county, and within the jurisdiction of this court; and Thomas Trounce, a person interested in said estate appearing to contest the application of the said petitioner, having been heard, and it appearing to the satisfaction of the court that the allegations in the petition of the said Rogers are true:

It is ordered that the said Robert C. Rogers be and he is hereby appointed administrator of the estate of the said Isaac Levick, deceased, and it is ordered that letters of administration upon the estate of the said deceased issue to the said Rogers, the public administrator,

T. W. FREELON, County Judge.

NO. 41. (A.)

STATE OF CALIFORNIA,  
CITY AND COUNTY OF SAN FRANCISCO, } Probate Court.

In the Matter of the Estate  
of  
John C. Cabaniss, deceased. }

And now this thirty-first day of May, in the year of our Lord one thousand eight hundred and fifty-eight, at the May term of the Probate Court for the city and county of San Francisco, begun and holden at the City Hall in said city and county on the third Monday of May, to wit: on the seventeenth day of May, in the year aforesaid; the petition of Robert C. Rogers, public administrator of, in and for the city and county of San Francisco aforesaid, praying for letters of administration on the estate of John C. Cabaniss, late of San Francisco deceased, to be issued to him, and the written opposition thereto of Moses G. Noble, and also the petition of said

Noble, praying for letters of administration to be issued to himself on said estate, coming on to be heard at the same time; and it appearing to the court that due proof by affidavit on file had been made, that notice had been given of both said petitions according to law, and legal proofs having been made of all the allegations contained in said petition of said Robert C. Rogers, public administrator, as aforesaid; and the allegations and proofs of the opponent and petitioner Noble having been heard and fully considered by the court at the different sessions of said court, held for the hearing thereof as well as other matters.

It is therefore ordered and decreed that the petition of said Moses G. Noble praying for letters of administration on the estate of said John C. Cabaniss, deceased, be denied, and the same is hereby denied and the opposition of said Noble to the petition of said Rogers, public administrator as aforesaid, be and the same is hereby overruled.

And it is hereby further ordered, adjudged and decreed that letters of administration on the estate of said John C. Cabaniss, deceased, be issued to the petitioner Robert C. Rogers, public administrator of the said city and county of San Francisco.

M. C. BLAKE, County Judge.

## NO. 42.

### PETITION FOR LETTERS *DE BONIS NON*, ON DEATH OF FORMER ADMINISTRATOR. (§ 58,97.)

Probate Court, City and County of San Francisco: ss.

In the Matter of the Estate	}	City and County of San Francisco.
of		
James McEntire, Deceased.		

To the Honorable the Judge of the Probate Court of the city and county of San Francisco.

The petition of Patrick McEntire, of said city and county, respectfully shows, that James McEntire, late of said city and county, died intestate in said city and county, on the 24th day of September, A. D., 1857.

That said deceased, at the time of his death, was possessed of real estate in said city and county of the value of two hundred and fifty dollars, and personal property of the value of eight hundred and twenty-five dollars.

That said deceased left as heirs to his estate, a mother, Jane McEntire, residing in Ireland, in the Kingdom of Great Britain, and two brothers, in this state, one of whom, John McEntire, has since died, leaving no widow nor children, and your petitioner, who is the only surviving brother, and left no other heirs.

That said John McEntire, by his petition, filed in this court, on the 6th day of October, 1857, applied for letters of administration to himself upon said estate. That, on the 19th day of the same October, upon hearing the said application, this court ordered, that letters of administration as asked for in said petition, issue to the said John, and that on the 18th day of December, 1857, letters of administration upon the said estate were duly issued to the said John McEntire; that on the 21st day of said December, appraisers upon the said estate were duly appointed by this court; and on the same day, the notice to creditors of said estate to prove their claims was ordered to be published in the San Francisco Herald, twice a week, for four weeks; that on the 28th day of January, 1858, an inventory of said estate, with the appraisement of said appraisers, was duly filed in this court, showing the total value of said estate to be ten hundred and seventy-five dollars.

And your petitioner further shows, that the said John McEntire, administrator as aforesaid, upon the said estate, died on the 28th day of February, last past, in said city and county, leaving said estate unadministered upon, except as above stated.

Therefore, your petitioner prays, that letters of administration *de bonis non* upon the said estate of James McEntire, deceased, may be granted to him in pursuance of the statute in such case made and provided.

JAMES McENTIRE.

Dated, San Francisco, March 9th, A. D., 1858.

NO. 48.

ORDER FOR LETTERS ON SAME. (62,97.)

In the Matter of the Estate }  
of } Probate Court.  
James McEntire, Deceased. } City and County of San Francisco.

The petition of Patrick McEntire, filed in this court on the 9th day of March, 1858, praying for letters of administration *de bonis non* upon the estate of said deceased, coming on to be heard on this 22d day of March, 1858, the time duly appointed for the hearing of the application made by said petition, and due proof having been made to this court that the clerk had given notice thereof by causing notices to be posted up in at least three public places in the said city and county, one of which was at the place where the court is held, stating the name of the deceased, the name of the applicant, and the term of the court at which the application would be heard, the same having been given at least ten days before the hearing, and that the notice was in all respects according to law, and no person interested in said estate appearing to contest the application of the said petitioner, the court proceeded to hear his allegations and proofs, and it being duly proved that the material facts set forth in said petition were true, and especially, that John McEntire, the former administrator of said estate died in said city and county on the 28th day of February, A. D., 1858, leaving said estate unadministered upon, except as set forth in said petition.

Now, on this 22d day of March, 1858, it is hereby ordered, that letters of administration *de bonis non* upon the estate of the said James McEntire, deceased, issue to the said Patrick McEntire, upon his taking the oath prescribed by law, and filing a bond according to law in the sum of two thousand dollars.

T. W. FREELON,  
County Judge, and Ex Officio, Judge of the Probate Court.

NO. 44.

PETITION FOR REVOCATION OF LETTERS OF ADMINISTRATION AND  
ISSUANCE OF LETTERS TO PETITIONER. (§ 67,70.)

To the Probate Court of the County of San Diego.

- § 67. The petition of Vicente Ceseña, respectfully sheweth, that he is the son of Domingo Ceseña, deceased.
- § 64. That administration upon the estate of said deceased, was, by the order of this court, on the day of January, 1856, granted to the public administrator of this county, no one then appearing to oppose his application for said administration.
- § 66. That your petitioner, after an absence of one year, has lately returned to this county and state, and desires that the administration granted as aforesaid to said public administrator, may be vacated, and his letters revoked, and that letters of administration may be issued to your petitioner, and to John Phoenix, Esq., a resident of this county, whom your petitioner prays may be joined with him in the administration of said estate. And your petitioner will ever pray, etc.

VICENTE CESEÑA.

May 1, 1856.

I, Maria Ceseña, widow of said deceased, unite in the foregoing petition, relinquishing my right of administration in favor of my son, the said Vicente.

MARIA CESEÑA.

May 1, 1856.

- § 58. I, John Phoenix, editor and proprietor of the San Diego Herald, agree to accept the joint administration of the estate of Domingo Ceseña, deceased, and unite with said Vicente in his above petition.

JOHN PHOENIX.

May 1, 1856.



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## NO. 45.

### ORDER FOR CITATION AND SPECIAL TERM, (§ 68.)

In the Matter of the Estate }  
of } Probate Court of the  
Domingo Ceseña, deceased. } County of San Diego.

On reading and filing the petition of Vicente Ceseña, praying for a revocation of the administration heretofore granted herein to the public administrator, and the issuance of letters of administration to him and to John Phoenix,

It is hereby ordered that, Monday, the day of May, 1856, be appointed a Special Term for the hearing of said petition, and that a citation be issued by the Clerk of this court to the said public administrator, to appear and answer said petition on the said day of May, 1856, at 10 o'clock in the forenoon, and that the clerk post the usual notices of this application for letters of administration according to law. § 68.

May 1st, 1856.

M. N., Probate Judge. § 60.

## NO. 46.

### CITATION. (§68, 288.)

In the Matter of the Estate }  
of } Probate Court,  
Domingo Ceseña, deceased. } County of San Diego.

The People of the State of California to the Sheriff of the county of San Diego, greeting :

By order of this court you are hereby required to cite A. B., public administrator of said county, to appear before this Court at the court room thereof, at the Court House in the city and county of San Diego, at a special term of the court, to be held on Monday, the day of May, 1856, at 10 o'clock in the forenoon of that day, then and there to answer the petition of Vicente Ceseña, this day filed herein, asking for the revocation of the letters of administration granted to said public administrator upon this estate, and the issuing of letters of administration to said petitioner and John Phoenix, and make due return of this writ. (§ 289, 290.)

Witness, the Honorable C. D., Judge ex officio of our Probate Court, in and for the county of San Diego, with the seal of said court affixed, this 1st day of May, A. D. 1856. § 288.

[SEAL OF THE  
PROBATE COURT.]

Attest : E. F., Clerk.

### RETURN OF THE FOREGOING CITATION. (§ 289, 290.)

I, G. H., Sheriff of the county of San Diego, certify that I served the within citation on A. B., the public administrator of said county, by delivering to him personally a copy thereof duly certified, on the 2d day of May, A. D. 1856, at the city of San Diego, in the county of San Diego aforesaid.

Dated San Diego, May 2d, 1856.

G. H., Sheriff of San Diego county.

By J. K., Deputy.

## NO. 47.

### ORDER REVOKING LETTERS OF PUBLIC ADMINISTRATOR AND GRANTING LETTERS TO THE APPLICANT. (§ 69.)

[Title, etc. as in foregoing.]

Application having been duly made to this court to remove A. B., the public administrator of this county, from the administration of this estate, and to grant administration to Vicente Ceseña, the son of said deceased, and to John Phoenix, as co-administrator with said Vicente Ceseña, by petition of said Vicente Ceseña, duly filed herein, and in which petition Maria Ceseña, the widow of deceased, and said John Phoenix join. § 67.  
§ 66.

Now, at this day, which has been appointed by this court, a special term for that purpose, the said application coming on to be heard, and the citation issued under § 68.

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- the order of this court to said administrator, being returned and filed with due proof of legal service, and the proceedings being in due form, and the parties appearing, the court proceeds to hear the proofs and allegations of the parties, and it appearing to the court therefrom, that the matters alleged in said petition are true, and that the said Vicente Ceseña and John Phoenix are competent to act as administrators, and the right of said applicant being established. And it further appearing to this court, that administration of this estate has been heretofore regularly granted to A. B., the public administrator of this county; and due proof having been made to the court and filed herein, that the clerk has given notice of this application for the issuance of letters of administration according to law, by posting up notices in three public places in this county, one of which was the place at which this court is held, at least ten days before this hearing, stating the name of the deceased, the name of the applicant, and the term (to wit: the special term appointed for the purpose) of the court at which the application would be heard.
- It is hereby ordered, that the letters heretofore granted to said A. B., public administrator, be, and the same are hereby revoked, and that letters of administration be granted to said Vicente Ceseña and John Phoenix, upon their taking the oath required by law, and filing separate (§ 74) bonds with sufficient guaranties to be approved by the court, in the sum of five thousand dollars each.

M. N., County Judge.

## NO. 48.

## LETTERS OF ADMINISTRATION. (§ 71.)

State of California, City and County of San Francisco.

Sarah Mark, is hereby appointed Administratrix of the estate of Harris Mark, deceased.

Witness: William Duer, clerk of the probate court, with the seal of the Probate court of San Francisco county, affixed this 8th day of February, A. D., 1858.

By order of court,

WILLIAM DUER, Clerk.

State of California, City and County of San Francisco.

I do solemnly swear, that I will support the Constitution of the United States and the Constitution of the State of California; that I will faithfully discharge the duties of Administratrix of the estate of Harris Mark, deceased, according to law.

SARAH MARK.

Subscribed and sworn [or "affirmed," as the case may be] before me, this 8th day of February, 1858.

- § 72. T. W. FREELON, Judge of the Probate Court.

## NO. 49.

## PETITION FOR FURTHER SECURITY WHERE SURETIES OF ADMINISTRATOR ARE INSUFFICIENT. (§ 78, 87.)

In the Matter of the Estate }  
of }  
Charles Dais. }

In Probate Court,  
City and County of San Francisco.

- § 78. Robert Jones comes and represents to and petitions the Probate Court respectfully as follows:

- That James McCull and Simon Brown, the sureties upon the administrator's bond of William Dais, the administrator [or executor, as the case may be] herein are insolvent, as appears by their petitions in insolvency, respectively filed in the district court of this district [or "are becoming insolvent," state the facts, or other cause, as set forth in section 78] and that the said bond is insufficient. That your petitioner is interested in said estate, being a creditor thereof. Your petitioner would also represent that said administrator is wasting the property of said estate, as is shown by the affidavit of A. B., hereto annexed and made a part of this petition.
- § 78. Wherefore your petitioner prays that a citation may issue to said administrator, requiring him to appear and show cause why he should not give further security, and that in the mean time his powers as such administrator be suspended. [§ 82, see also § 281 to § 286.]

- § 79. [Sworn to as in No. 85.]

ROBERT JONES.

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## NO. 50.

### ORDER FOR CITATION ON THE ABOVE. (§ 79.)

[Title etc., as above.]

Application having been made to me for the requirement of further security from the administrator of this estate [or, § 83, without any application "it coming to my knowledge, etc."] on the allegation that the sureties upon his bond have become insolvent, and being satisfied that the matter requires investigation: It is hereby ordered, that a citation issue to the said administrator, requiring him to appear before me, at my chambers, on the 10th day of May, 1867, at 10 o'clock, A. M., to show cause why he should not give further security: And it being alleged on the oath of A. B., whose affidavit is annexed to said petition, that said administrator is wasting the property of said estate: It is ordered, that the powers of said administrator be suspended until the matter can be heard and determined. § 79. § 87. § 82.

T. W. FREELON, County Judge.

Dated, May 5, 1867.

## NO. 51.

### CITATION. (§ 79, 288.)

In the Matter of the Estate of Charles Dais, Deceased. } In Probate Court,  
City and County of San Francisco.

The People of the State of California, to the Sheriff of the City and County of San Francisco, greeting:

By order of this court, you are hereby required to cite William Dais, administrator of the estate of Charles Dais, deceased, to appear before the Probate Judge of the city and county of San Francisco, at his chambers, at the city hall, in the city and county of San Francisco, on the 10th day of May, 1867, at 10 o'clock, in the forenoon of that day, then and there to show cause why the sureties upon his administrator's bond [or, "his bond given on an order to sell real estate," or other bond, as the case may be] should not be declared to be insufficient, and why he should not give further security, and why his letters of administration should not be revoked, for reason of having wasted the property of said estate, (§ 283,) and make due return hereof. (§ 289, 290.)

Witness, the Hon. T. W. Freelon, Judge ex officio of our probate court, in [SEAL.] and for the city and county of San Francisco, with the seal of said court affixed, this 5th day of May, A. D., 1867.

Attest: THOMAS HAYES, Clerk,  
By DENIS LYONS, Deputy Clerk.

## NO. 52.

### ORDER ON THE FOREGOING APPLICATION, THAT NEW SECURITY BE GIVEN. (§ 80, 81.)

[Title etc., as above.]

The citation ordered herein, on the 5th day of May, 1867, having been duly served and returned, and the said William Dais, administrator etc., having this day appeared before me, at the time and place named in said citation, and it being shown to me, that one of the sureties of said administrator, the said Simon Brown, is solvent, and amply sufficient; the said Simon Brown, who has filed his application in insolvency, being another person of the same name; and it appearing to me that the said James McCull, the other surety, is insolvent; and it further appearing to me, after a full hearing of the proofs and allegations of the parties, that said administrator is not wasting, nor has he been wasting the property of said estate; the order of the 5th May, instant, suspending the powers of said administrator, is vacated, and he is fully restored to the exercise of said powers, and it is hereby ordered, that the said administrator give further security, in the sum specified in the bond already given, in the place of the said James McCull, to be approved by me, within five days, or that his letters of administration be revoked.

May 10th, 1868.

T. W. FREELON, County Judge.

NO. 53.

ORDER REVOKING LETTERS IN THE SAME MATTER. (§ 81.)

[Title etc., as above.]

§ 76. Order having been made herein by me, on the 10th day of May, instant, that William Dais, the administrator herein, give further security upon his bond as administrator, in the place of James McCull, within five days from that date, and no further security having been given, and the five days having elapsed, it is hereby ordered, that the letters of administration of said William Dais, be, and they are hereby revoked, and his authority thereon terminated.  
May 16th, 1858.

T. W. FREELON, County Judge.

NO. 54.

ORDER RELEASING SURETY ON HIS REQUEST. (§ 84 to § 86.)

In the Matter of the Estate }  
of } Probate Court,  
James H. Wingate, deceased. } January 4, 1858.

Helena Wingate, administratrix of said estate, having been cited to appear before this court, by an order entered on the 24th day of December last, to show cause why Frank T. Maynard, one of the sureties on her official bond should not be released from all further liability as such bondsman; and the said Helena Wingate, as administratrix, having this day appeared in obedience to said order, and filed a new bond, conditioned, for the faithful discharge of her duties as administratrix in lieu of her former one, which said bond has been this day approved by me: It is hereby ordered, that the said Frank T. Maynard, be, and he is hereby fully discharged from all future liability for the future acts of the said Helena Wingate, as administratrix of the said estate.

T. W. FREELON, County Judge.

NO. 55.

ORDER ON APPLICATION OF SURETY, THAT NEW BOND BE GIVEN.  
(§ 84 to 86.)

In the Matter of the Estate of J. Willard }  
Barker, deceased, on the application of }  
Henry Pierce to be discharged from }  
liability on the bond of James Thomp- }  
son, executor. }

This day, came on to be heard, the application of Henry Pierce, one of the sureties on the bond of James Thompson, as executor of J. Willard Barker, deceased, to be released from all liability on said bond for any future act, default, or misconduct of said executor, and it being shown to the court that a citation has been duly issued according to the former order of the court requiring the said Thompson to appear on Monday, the 1st day of March, 1858, at 11 o'clock, A. M., and give new securities to the satisfaction of the Judge on his, the said Thompson's bond as executor as aforesaid, and that said citation was duly served on said Thompson on the 12th day of February, 1858; and it appearing also, that a statement in writing has been filed, setting forth the desire of said surety, Henry Pierce, to be relieved from all liability on said bond thereafter arising, and the reasons therefor, which statement is subscribed and verified by the affidavit of said Pierce, and that said statement, together with the order of the court, was duly served on said Thompson on the 12th day of February, 1858, more than ten days before the time appointed for the hearing of this application, and that the said Thompson appearing by counsel, the hearing thereof has been regularly continued to this day by consent. It is now ordered, that within five days from this date, the said James Thompson do give new sureties on his said bond, as executor, to the satisfaction of the judge; and that on his

failure so to do, his letters testamentary be revoked; and it is further ordered, that this application be continued to Monday, the 22d day of March, inst., for the further order of the court herein.

T. W. FREELON, County Judge.

NO. 56.

ORDER REVOKING LETTERS FOR FAILURE TO GIVE NEW BOND. (§ 84 to 86.)

In the Matter of the Estate } In the Probate Court  
of } of the City and County of San Francisco.  
J. Willard Barker, Deceased. }

James Thompson, executor of the last will and testament of J. Willard Barker, deceased, having neglected to give new sureties, to the satisfaction of the judge, on his bond as executor, as aforesaid, within the time prescribed by the order of this court of the 15th of March inst., it is now ordered, that the letters testamentary of the estate of said Barker, deceased, heretofore issued to said Thompson by this court, be, and the same are hereby revoked.

San Francisco, March 22d, 1858.

T. W. FREELON, County Judge.

NO. 57.

ORDER FOR SPECIAL LETTERS. (§ 89.)

In the Matter of the Estate } In the Probate Court,  
of } City and County of San Francisco.  
Hamilton Bowie, Deceased. } State of California.

It appearing to me, upon the petition of Mrs. Mary Bowie, widow of the said Hamilton Bowie, deceased, that said deceased departed this life on or about the twenty-first day of September, A. D. eighteen hundred and fifty-six, in the Republic of Nicaragua, Central America, and that he was at the time of his death a resident of the said city and county of San Francisco, and that he died intestate, leaving property and estate in said city and county, and that said petitioner is the widow of said deceased, and prays general letters of administration on said estate, and in the mean time special administration thereon; and the said allegations in said petition appearing to be true by witness, and it likewise appearing that there has been delay in taking out letters of administration on said estate, it is ordered that Monday, the 10th day of May, 1858, be appointed for the hearing of said application for general letters of administration upon said estate, and that until such general letters be granted that said Mary Bowie be appointed special administratrix of said estate, with full power and authority to collect and take charge of the estate of the deceased, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of said estate and that letters as such special administratrix shall issue to said Mary Bowie, on giving bond in the sum of seven thousand dollars, with sureties to the satisfaction of the undersigned probate judge.

San Francisco. April 24th, 1858.

M. C. BLAKE, County Judge.

NO. 58.

LETTERS OF SPECIAL ADMINISTRATION. (§ 71, 89.)

STATE OF CALIFORNIA, }  
CITY AND COUNTY OF SAN FRANCISCO, } In Probate Court.

Mary Bowie is hereby, in accordance with the order of the probate judge, appointed special administratrix of the estate of Hamilton Bowie, deceased, until general letters be granted, with full power and authority to collect and take charge of the estate of said deceased, in whatever county or counties the same may be found,

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and to exercise such other powers as may be necessary for the preservation of the estate.

Witness, William Duer, Clerk of the Probate Court of the city and county  
[SEAL.] of San Francisco, with the seal of said court affixed, this 24th day of  
April, A. D. 1858.

By order of the Court:

WILLIAM DUER, Clerk.

By D. P. BELKNAP, Deputy Clerk.

State of California, City and County of San Francisco, ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will faithfully discharge the duties of special administratrix of the estate of Hamilton Bowie deceased, according to law. M. BOWIE.

Subscribed and sworn to before me, this 26th day of April, 1858,

D. P. BELKNAP, Deputy County Clerk.

### NO. 59.

#### ORDER FOR PROBATE OF A WILL SUBSEQUENTLY FOUND AFTER ADMINISTRATION HAS BEEN GRANTED, AND FOR REVOCATION OF SUCH ADMINISTRATION. (§ 98, 99.)

State of California, }  
City and County of San Francisco. } Probate Court.

In the Matter of the Estate }  
of } Order of Probate.  
J. Caleb Smith, Deceased. }

The petition of Austin E. Smith, heretofore filed in the above entitled matter, praying for the admission to probate of a document purporting to be an authenticated copy of the last will and testament of said deceased, and to be appointed executor of the said estate, and that letters testamentary therein be granted to said petitioner, this day regularly coming on to be heard.

- § 17. On reading and filing due proof, of the publication of the order to show why the  
§ 28. prayer of the said petitioner should not be granted as aforesaid, and of the notice of  
the present hearing; and it appearing to the court that the will of said deceased has  
§ 27. been duly proved and allowed in the State of Virginia, that the said testator at the  
time of his death was a resident of the city of San Francisco, and has left estate in  
this city and county, and that said will has been executed in conformity with the  
laws of the State of California, and it therefore appearing that the instrument ought  
to be allowed as the will of the said deceased, and that the said copy and the probate  
§ 18. thereof are duly authenticated, and R. H. Lloyd, Esq., the attorney appointed  
by the court to represent the absent heirs and persons interested resident out of this  
city and county being present and consenting thereto, and no one appearing to op-  
pose;

And it further appearing that the said Austin E. Smith was duly appointed the administrator of the said estate by an order of this court, dated the 22d day of October, 1856, and that the said will has been discovered and duly proved and allowed as aforesaid, since the granting of said order.

It is now, this fifteenth day of March, 1858, ordered, adjudged and decreed, that the said will be allowed and recorded as an authenticated copy of the last will and testament of J. Caleb Smith, deceased, and that said will have the same force and effect as if it had been originally proved and recorded in this court; it is further ordered, that the said Austin E. Smith be, and he is hereby appointed, executor of said will, and that letters testamentary thereon issue to said executor upon his taking the oath prescribed by law, and giving a bond conditioned for the faithful execution of his duties as such executor, in the sum of twelve thousand dollars, to be approved by the judge of this court.

And it is further ordered, that the letters of administration heretofore granted to the said Austin E. Smith as aforesaid, be and the same are hereby revoked, and that said Austin E. Smith do render an account of his administration as aforesaid to this court within thirty days from this date.

San Francisco, March 15th, 1858.

T. W. FREELON, County Judge.

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NO. 60.

APPOINTMENT OF APPRAISERS. (§ 106.)

In the Matter of the Estate }  
of } In the Probate Court,  
Alexis Williams, Deceased. } of the City and County of San Francisco.

Letters of administration having been granted to I. Lawrence Pool, and application being made to the court for appointment of appraisers, to appraise the estate of said deceased :

It is hereby ordered that C. C. P. Parker, George Jones and Samuel Swift, three disinterested persons, competent and capable to act, be appointed such appraisers. San Francisco, April 1st, 1858. M. C. BLAKE, Probate Judge.

NO. 61.

INVENTORY, WITH THE AFFIDAVITS, &c.

In the Matter of the Estate }  
of } Probate Court.  
Alexis Williams, Deceased. } City and County of San Francisco.

I, William Duer, County Clerk of the city and county of San Francisco, and ex officio Clerk of the Probate Court, do hereby certify that C. C. P. Parker, George Jones and Samuel Swift have been duly appointed appraisers of the estate of Alexis Williams deceased, by order of the court, duly entered and recorded on the 1st day of April, A. D. 1858.

[SEAL.] Witness my hand and seal of said Probate Court, this 1st day of April 1858. WILLIAM DUER, Clerk.

State of California, City and County of San Francisco, ss.

C. C. P. Parker, George Jones and Samuel Swift, duly appointed appraisers of the estate of Alexis Williams deceased, being duly sworn each for himself says, that he will truly, honestly and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

Subscribed and sworn before me, this 17th day of }  
May, 1858. } JOHN HANNA, Deputy Clerk. } C. C. P. PARKER,  
GEORGE JONES,  
SAMUEL SWIFT.

In the Matter of the Estate }  
of } Inventory and Appraisement. (§ 105, 107, 108.)  
Alexis Williams, Deceased. }

*Real Estate.*

1. A certain lot of land in the city and county of San Francisco, described as follows, etc., etc., valued at - - - \$10,000 00
2. A certain tract of land in the county of Alameda, described, etc., etc., valued at - - - - - 5,000 00

*Personal Estate.*

3. Promissory note, made by John Hoyt, dated May 1, 1857, for \$1,000, endorsed by Wm. Pitt. Payment of \$200 receipted. Valued at - - - 800 00
4. Promissory note, Peter Hanks, \$375, considered worthless. - - - 200 00
5. One horse, valued at - - - - - 5,000 00
6. One-half partnership interest in the house of Holman, Williams & Co., valued at - - - - - 47 00
7. Clothing and furniture, small items, valued at - - - 1,083 25
8. Moneys that have come to the hands of the administrator, - - -

\$22,130 25

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State of California, City and County of San Francisco: ss.

- § 111. I. Lawrence Pool, administrator of the estate of Alexis Williams deceased, being duly sworn says, that the annexed inventory contains a true statement of all the estate of the deceased that has come to the knowledge and possession of deponent, and particularly of all money belonging to said deceased, and all just claims of said deceased against this deponent.

I. LAWRENCE POOL.

Subscribed and sworn to before me, this 17th day of May, A. D. 1858.

WILLIAM R. SATTERLEE, Deputy Clerk of the Probate Court.

- § 111. We, the undersigned duly appointed appraisers of the estate of Alexis Williams deceased, do certify that the property mentioned in the foregoing appraisement has been exhibited to us, and we appraise the same at twenty-two thousand one hundred and thirty dollars and twenty-five cents.

May 20th, 1858.

C. C. P. PARKER,  
GEORGE JONES,  
SAMUEL SWIFT.

Estate of Alexis Williams, deceased,

To Parker, Jones and Swift, Appraisers, Dr.

To compensation for services in appraising said estate, items as follows:

2 days' services, at \$5 per day each	-	-	-	-	\$30 00
Necessary disbursements, as follows:					
Fare to Alameda county and return,	-	-	-	-	1 50
					<u>\$31 50</u>

Received payment,

C. C. P. PARKER,  
GEORGE JONES,  
SAMUEL SWIFT.

- § 106. This bill of appraisers' fees allowed this 20th May, 1858.

M. C. BLAKE, Probate Judge.

State of California, City and County of San Francisco, ss.

- § 106. C. C. P. Parker, George Jones and Samuel Swift, the appraisers above named, being duly sworn each for himself says that the foregoing bill of items is correct and just, and that the services have been duly rendered as therein set forth.

Subscribed and sworn to before me, this 20th }  
day of May, A. D. 1858. }  
BENJ. E. BABCOCK,  
Deputy Clerk.

C. C. P. PARKER,  
GEORGE JONES,  
SAMUEL SWIFT.

#### NO. 62.

ORDER TO SHOW CAUSE WHY LETTERS TESTAMENTARY, OR OF ADMINISTRATION SHOULD NOT BE REVOKED FOR FAILURE TO FILE INVENTORY.

[Title of estate, etc.]

- § 112. On reading and filing the petition of A. B., duly verified, showing that C. D., the administrator of the estate of E. B., deceased, has neglected to file any inventory of said estate, within the period of the next term after his appointment, the time prescribed by law, nor within the period of two months thereafter, the further time granted him for that purpose by the order of this court duly made and recorded on the 4th day of January, 1858; it is hereby ordered, that the said C. D., administrator, be cited to be, and appear before this court, at, etc., on, etc., to show cause why his letters of administration should not be revoked.

M. N., Probate Judge.

Dated, etc.

#### NO. 63.

SUMMARY REVOCATION OF LETTERS FOR FAILURE TO FILE INVENTORY.

In Probate Court, etc. In the Matter of the Estate of, &c.

- § 112. It appearing to this court, from the files thereof, and from the proofs made to the



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satisfaction of the court, that the executor of the last will and testament of A. B., deceased, has failed to return any inventory of the property of said estate, that the term of court succeeding the term at which he was appointed executor, has expired, and that, after the order of this court, duly made, and returned served upon said executor, he refuses or neglects to file such inventory, or to show cause, and the time allowed by said order having expired : Now, on motion of J. K., it is hereby ordered, that his letters testamentary be, and the same are hereby revoked, and his bond as such executor, is declared forfeited and held liable to said estate for any injury sustained by said neglect.

[Signed, etc.]

[Dated, etc.]

NO. 64.

PETITION AND COMPLAINT OF EMBEZZLEMENT, etc. (§ 117.)

[Title and Estate, and Court.]

To the Hon. the Probate Judge of, &c.

A. B., administrator, &c., complains that one C. D., as your petitioner, is informed § 117. and believes, was a short time previous to the death of deceased, in possession of a certain diamond ring, of the value of \$500, the property of the said deceased ; that the said C. D., refuses to give any information in regard to the same or to make any answer to the inquiries of your petitioner in reference thereto. Wherefore, your petitioner complains that said C. D. conceals, or has embezzled or disposed of said property of said deceased, and prays that he may be cited to appear before this honorable court and be examined on oath, and answer interrogations touching the matter of this complaint.

A. B. Adm'r.

[Affidavit as in form No. 85.]

An order for citation and also a citation can easily be drawn from the above petition. See forms Nos. 45, 46 and 50, 51.

NO. 65.

ORDER FOR WARRANT OF COMMITMENT FOR REFUSING TO ANSWER  
IN THE ABOVE MATTER. (§ 118.)

[In the Matter of, &c.—In Probate Court, &c.]

C. D., having been cited before this court to be examined and answer interrogatories concerning certain property alleged in the complaint of A. B., administrator, to be the property of said estate, and the citation being duly returned, properly served, and the said C. D. having appeared in obedience thereto, and having refused to answer the interrogatories put to him touching the matter of said complaint, after being ordered thereto by the court, and which interrogatories are as follows : [here insert] and the said C. D., still refusing to answer the said interrogatories whereby said C. D. is guilty of a contempt: It is hereby ordered, that the said C. D. be committed to the county jail of this county, there to remain in close custody, until he shall submit to the order of this court, and answer said interrogatories, and that a warrant for that purpose issue.

M. C. BLAKE, County Judge.

NO. 66.

WARRANT OF COMMITMENT. (§ 118)—(§ 481, 489 of Practice Act.)

In the Matter of the Estate }  
of } In the Probate Court.  
E. F., Deceased. } City and County of San Francisco.

The People of the State of California to the Sheriff of the city and county of San Francisco, greeting :

You are hereby commanded to take the body of C. D., and imprison him in the county jail of the city and county of San Francisco, in close custody, for refusing

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to answer certain interrogatories propounded to him upon his examination on the complaint of A. B., administrator, in the matter of the estate of E. F., deceased, as follows: [here insert interrogatories,] there to remain until he shall consent to answer said interrogatories, or until the further command of this court.

[L. s.] Witness, the Honorable M. C. BLAKE, Judge *ex officio* of our Probate Court, in and for the City and County of San Francisco, with the seal of said court affixed, this 19th day of April, A. D. 1858.

Attest:

WILLIAM DUER, Clerk.

By J. F. BOWMAN, Deputy.

#### NO. 87.

#### PETITION FOR ALLOWANCE FOR THE SUPPORT OF FAMILY. (§ 120.)

Title etc., of Estate and Court.

The petition of C. B., widow of A. B., deceased, respectfully sheweth:

That letters of administration have been granted herein to E. F., [or that no letters of administration have yet been granted upon said estate,] and that no inventory has been as yet returned to this court.

§ 120. That your petitioner, and G. H., J. K. and L., the minor children of said deceased, are without estate of their own, and wholly dependant upon the estate of said deceased for maintenance; that said estate is amply able to provide an allowance to your petitioner for her support, and that of her said minor children to the extent of \$250 per month, and which is a reasonable amount for that purpose, according to their circumstances and accustomed mode of life.

Wherefore, your petitioner prays that an allowance out of said estate to said amount of \$250 per month, for the support of the family of deceased, until the return of said inventory, be made by order of this court.

C. B.

[Sworn to as in No. 85.]

#### NO. 88.

#### ORDER FOR AN ALLOWANCE.

[Title of Estate, etc.]

§ 120. On reading and filing the petition of C. B., the widow of said deceased, praying that a provision for the support of the family of deceased, be made out of said estate, until the return of an inventory. It is hereby ordered, that the sum of \$250 per month be appropriated out of said estate for the support of said C. B. and her minor children, until the inventory be returned, and E. F., the administrator of said estate is hereby ordered to pay the same monthly, on the first day of each and every month, to the said C. B., widow of said deceased, until said inventory be returned, or until the further order of this court.

M. N, Probate Judge.

[Dated, etc.]

#### NO. 89.

#### ORDER SETTING APART PROPERTY (§ 121.)

[Title, etc.]

§ 121. The petition of C. B., being filed herein and presented to this court, and it appearing to this court that the inventory of the estate of deceased, has been returned and filed, the same having been duly appraised, whereby, it appears that said estate is possessed of property to the amount in value of \$20,000, and it further appearing by the said petition of C. B., the widow of deceased, that the amount of property included in said inventory which is by law exempt from execution, is insufficient for the support of the said widow and the minor children of deceased, and that the sum of \$250 per month heretofore allowed by this court is insufficient for the purposes of such maintenance; and it further appearing by said petition that the debts

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of said estate are moderate, and do not exceed in all probability the sum of \$1,000. It is hereby ordered, that the order heretofore made in this estate, granting an allowance to the widow and minor children of deceased of \$250 per month be vacated, and that an allowance of \$300 per month be made from henceforth, and until the further order of the court, to be paid to said widow, monthly, on the first day of each month by said administrator. And it is further ordered, that the homestead of said deceased, consisting of a certain lot with the dwelling house thereon, situate, lying and being in the city of San Francisco, and described as follows, etc.: [insert description] and also the following articles mentioned and appraised in said inventory, to wit: [insert the articles,] be set apart for the use of the family of deceased, the one half part of all which property so set apart, shall belong to the said widow, and the remaining half in equal shares to John, James, Sarah, Ellen E., and Mary Ann, the minor children of deceased.

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§ 124,  
note.  
§ 121.

M. C. BLAKE, Probate Judge.

## NO. 70.

### ORDER FOR ALLOWANCE TO FAMILY WHILE ESTATE IS INSOLVENT. (§ 122.)

[Title, etc. as in foregoing.]

On reading and filing the petition of R. S., widow of deceased, duly verified, and it appearing therefrom that the said estate is insolvent and that it is necessary that provision should be made out of said estate for the maintenance of the family of said deceased, it is hereby ordered that an allowance of \$50 per month be made for their support during the progress of the settlement of the estate for a period not to exceed one year, and the administrator is ordered to pay the same monthly to said R. S., widow of deceased.

§ 122.  
§ 123.

Dated, etc.

M. N., Probate Judge.

## NO. 71.

### ORDER THAT THE WHOLE ESTATE BE PAID TO THE FAMILY. (§ 126.)

[Title of Estate, etc.]

The petition of A. B., widow of L. B. deceased, being presented to this court, showing that there are four minor children of deceased him surviving, George, Mary, Susan and Helen Kate, who are without means of support, and it appearing from the inventory returned by the said A. B., administratrix of said deceased, that the value of the estate does not exceed five hundred dollars,

It is hereby ordered, adjudged and decreed, that after the payment of the charges of the funeral of said deceased and of the expenses of administration, which amount, as appears by the account of the administratrix filed herein, to the sum of \$122 50, the whole of the estate being the amount of \$ , as shown by said inventory, be assigned for the use and support of said minor children, and that no further proceedings be had in this administration unless further estate be discovered. And it is further ordered that the whole of said property so set apart, to wit, the property and estate set forth in the inventory filed herein, less the amount necessary to pay said funeral charges and the expenses of administration, be and the same is hereby declared to be the property of said minor children, the widow, the said A. B., having a maintenance derived from her own property, equal to the one-half part or portion of the property set apart for the benefit of the family of deceased, the whole amount thereof is hereby decreed to be the property of said minor children.

§ 125.  
127.

M. N., Probate Judge.

ORDER FOR ALLOWANCE TO FAMILY. (§122.)

In the Matter of the Estate of John Hart, Deceased.	}	In Probate Court, City and County of San Francisco.
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It appearing to the court on the application of the executrix and executor of said estate that said testator died leaving a widow and five children, four of whom are minors and three of the minors females, and that the said widow and children are not possessed of any separate estate and that a reasonable allowance out of the said estate is necessary for their support. It is therefore ordered by the court that the sum of twenty-five hundred dollars be allowed and set apart for the support and maintenance of said widow and minor children, for one year from and after the date of the letters testamentary herein, and also that the property belonging to said estate and exempt from execution shall also be set apart and reserved for the use of said widow and minor children.

T. W. FREELON, County Judge.

ORDER FOR ALLOWANCE AND HOMESTEAD. (§124.)

In the Matter of the last Will and Testament of Henry Gunter, Deceased.	}	In the Probate Court, in and for the County of San Francisco.
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Elizabeth Agnes Gunter, the widow of the said Henry Gunter deceased, having heretofore presented her petition to this court, praying that the homestead and other property exempt from execution be set apart for the use of the said widow and the the minor child of the deceased, and that an allowance be made to her for the support and maintenance of herself and family, from the time of the death of the said Henry Gunter, during the progress and until the final settlement of his estate, and the same having been referred to D. P. Belknap, Esq., to ascertain and report to this court what sum should be allowed to said petitioner for the support and maintenance of herself and family, as prayed in said petition, what portion of the property mentioned in said petition is exempt from execution, and whether the premises therein mentioned do constitute the homestead of said petitioner, and if so the value thereof, and the said referee having this day presented his report on said application, showing that the premises mentioned in said petition do constitute the homestead of said petitioner and her family, and are of the value of \$2,000 or thereabouts; that the household furniture and personal property mentioned in the inventory herein filed is all exempt from execution and is of the value of \$200 or thereabouts; and recommending that the said petitioner E. A. Gunter have an allowance of one hundred dollars per month from the time of the death of the said Henry Gunter (October 19th, 1856) until the present time, and an allowance of one hundred and fifty dollars per month for the future; that the said homestead be assigned to the said petitioner subject to the claim of the mortgage of Brisac, and that the household furniture, as set forth in the inventory be set apart to the said petitioners.

Now therefore, it is ordered that said application of said petitioner be granted and said report be confirmed; that the premises mentioned in said petition and in the inventory herein filed, situated on Eliza Place, between Washington and Jackson and Taylor and Jones streets, in the city and county of San Francisco, be set apart for the benefit of the said Elizabeth A. Gunter, the widow of said deceased, and the said Archibald C. Gunter, the only child of said deceased, subject however to the mortgage given by the said Henry and Elizabeth A. Gunter, in the lifetime of said Henry Gunter to Felix Brisac which said mortgage and the rights of the said mortgagee shall not be in anywise impaired or affected by this order. It is further ordered that the household furniture and other personal property mentioned in the inventory herein filed, exempt from execution, be set apart for the use of the said petitioner and the said minor child Archibald C. Gunter. and that there be allowed to said petitioner, for the support and maintenance of herself and family, one hun-

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dred dollars per month from the time of the death of said Henry Gunter (Oct. 19th, 1856) until the present time, and one hundred and fifty dollars per month from this time on, and until the final settlement of said estate.

Dated San Francisco, May 24th, 1858.

M. C. BLAKE,  
County Judge and ex-officio Probate Judge.

NO. 74.

ORDER OF PUBLICATION OF NOTICE TO CREDITORS. (§128.)

In the Matter of the Estate }  
of } City and County of  
Valentine Castro, Deceased. } San Francisco.

It is ordered, that notice to the creditors of the said Valentine Castro, deceased, requiring all persons having claims against the said deceased, to exhibit the same with the necessary vouchers, according to law, be given by publication in the Daily Alta California, a newspaper, printed and published in the city and county of San Francisco, twice a week, for the period of ten weeks.

T. W. FREELON, County Judge.

NO. 75.

NOTICE TO CREDITORS, WITH AFFIDAVIT OF PUBLICATION. (§128, 129.)

Estate of Valentine Castro, deceased.

Notice is hereby given by the undersigned, administrator of the above named estate, to the creditors of, and all persons having claims against said deceased, to exhibit the same, with the necessary vouchers, within ten months from the first publication of this notice to the undersigned, at his office, Nos. 36 and 38, Battery street, in the city of San Francisco.

GEO. C. JOHNSON, Administrator.

San Francisco, February 1st, 1858.

City and County of San Francisco, ss.

A. D., printer, [or "publisher," § 129] of the Daily Evening Bulletin, a newspaper, published in said city and county, being duly sworn, says, that the notice to creditors of the estate of Valentine Castro, of which the annexed is a copy, was published in said paper, twice a week, for the period of ten weeks, from the 1st day of February, 1858, to the 19th day of April, 1858.

A. D.

Sworn before me, April 20th, 1858.

WM. F. SWASEY, Notary Public.

NO. 76.

CREDITORS CLAIM, ORDER TO TAKE ORIGINAL FROM FILE, AND PROCEEDINGS THEREON.

In the Matter of the Estate }  
of }  
Wm. H. Palmer, deceased. }

On Application of Nicholas Luning, it is ordered, that said Nicholas Luning may withdraw from the files of this court his claim, for safe keeping, certified and approved by the administrator and county judge, against the estate of William H. Palmer, deceased.

It is also ordered, that the clerk of this court make out a correct copy of said claim to be left on file, in lieu of the original, at the expense of the said Luning, and on the said Luning executing a receipt for said claim, the clerk is directed to deliver said original paper to him.

T. W. FREELON, County Judge.

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Estate of William H. Palmer, deceased,

To Nicholas Luning, Dr.

To amount of principal sum expressed in a certain promissory note made by decedent, William H. Palmer, on the 26th August, 1856, by which he promised to pay to said Nicholas Luning, the sum of forty thousand dollars, with interest, until paid, at the rate of two and a half per cent per month, which said note is in the words and figures, following, to wit:

" \$40,000.

San Francisco, August 26, 1856.

" Twelve months after date, without grace, I promise to pay to Nicholas Luning, " or order, forty thousand dollars, with interest, at the rate of two and a half per cent per month, payable monthly, in advance, for value received, negotiable and " payable at the office of said Nicholas Luning, in the city of San Francisco."

WM. H. PALMER."

Which said note was secured to be paid by a mortgage, made by said decedent to said Luning, of the date of said note, executed in due form of law by which was conveyed to said Luning, the following mentioned property, to wit:

1st. A lot of ground in the city of San Francisco, south side of Jackson street, between Drum and Eastern front of the city, extending to Oregon street.

2d. Water lots Nos. 457, 458, 463, 464, and 465, in said city.

3d. Hundred vara lot No. 145, in said city.

All of which, will more fully and at large appear by reference to said mortgage, recorded in the Recorder's Office of San Francisco county, in Liber 31 of mortgages at page 695.

Claim, \$40,000—interest being paid to 26th August, 1857.

State of California, City and County of San Francisco, ss.

Nicholas Luning, being duly sworn, deposes and says, that the foregoing claim against the estate of William H. Palmer, deceased, is justly due, and owing to deponent, that no payments have been made thereon, except only the interest, which has been fully paid up to 26th August, 1857, and that there are no offsets to the principal sum of said claim to the knowledge of deponent.

NICHOLAS LUNING.

Subscribed and sworn to before me this 26th day of Aug. 1857.

[SEAL.] E. P. PECKHAM, Notary Public.

(Endorsed.) Filed Dec. 14, 1857. BELKNAP, D. C.

This claim being proved to the satisfaction of the undersigned administrator, and being known by the undersigned to be correct, it is hereby endorsed, "allowed," and admitted as a just claim against the estate of William H. Palmer, deceased.

JOSEPH C. PALMER,

Administrator of estate of W. H. Palmer.

Allowed and approved, this 14th September, 1857.

T. W. FREELON, County Judge

State of California, City and County of San Francisco, ss.

I, William Duer, county clerk of the city and county of San Francisco, State of California, and ex officio clerk of the Probate court thereof, do hereby certify the foregoing to be a true copy of the original delivered to the said Luning in accordance with the annexed order of this court, this day, made and filed in said court.

Witness my hand and the seal of said court, this 14th day of December, A. D., 1857.

WILLIAM DUER, Clerk,

D. P. BELKNAP, Deputy Clerk.

Received, San Francisco, Dec. 14th, 1857, of the clerk of the probate court, in accordance with the order of the court hereto annexed, the original paper of which the foregoing is a certified copy.

N. LUNING.

NO. 77.

CREDITOR'S CLAIM. (§ 181.)

In the Matter of the Estate }  
of }  
Jabez Coit, Deceased. }

Letters of administration upon the above named estate having been granted to J. H. Fish, the undersigned presents his claim against said estate with the necessary vouchers to said J. H. Fish, administrator, for approval, as follows, to wit:

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Estate of Jabez Coit,	To Robert C. Johnson, Dr.	
To amount of promissory note herewith filed, dated January 5, 1858,	-	\$500 00
To interest on same, from January 5, 1858, at 2 per cent. per month till		
paid,	-	-
To cash loaned, May 1, 1856,	-	50 00
To agreed price of horse, sold and delivered March 6th, 1857,	-	250 00

State of California, City and County of San Francisco, ss.

Robert C. Johnson, whose foregoing claim is herewith presented to the administrator of said estate, being duly sworn says that the amount thereof, to wit, the sum of eight hundred dollars, with interest as above set forth, is justly due to this claimant. § 181.

[See Errata.]

ROBERT C. JOHNSON.

Subscribed and sworn to before me, May 25th, A. D. 1858.

J. F. BOWMAN, Deputy Clerk.

[Indorsement upon this claim.]

The within claim is allowed and approved for \$500, with interest as claimed, and § 182.  
\$250 for the horse. The item of \$50 is without voucher or proof, is barred by the § 135.  
statute of limitations and is rejected. § 139.

May 25th, 1858.

J. H. FISH, Administrator.

Allowed and approved this 27th day of May, 1858, for all but the item of \$50, § 182.  
which latter is rejected. M. C. BLAKE, Probate Judge. § 139.

## NO. 78.

### CONSENT BETWEEN ADMINISTRATOR AND A CLAIMANT TO REFER. (§ 142.)

[In the Matter of, etc.]

The claim of A. D. against the estate of B. C. deceased, for the sum of \$500, alleged to be due to the said A. D. for money lent and advanced by him to deceased in his life time, having been presented to E. F., the administrator of said estate, verified in due form of law, and the said administrator having reason to doubt the correctness thereof, the same being unaccompanied by any voucher and not appearing upon the books of said deceased, and having therefore endorsed thereon his rejection of the same, it is hereby agreed to refer the matter to J. T. Boyd, Esq., a disinterested person, to hear and determine the said claim and report thereon to the District court, provided the appointment of said J. T. Boyd be approved by the probate judge. § 181.

Dated, etc.

Signed E. F., Administrator,  
A. D., Claimant.

[Indorsement.]

The appointment within, of J. T. Boyd, Esq., referee is approved. § 142.  
Dated, etc. M. N., Probate Judge.

## NO. 79.

### RULE OF SUCH REFERENCE TO BE ENTERED IN DISTRICT COURT. (§ 142)

In the District Court of the 4th Judicial District of the State of California.

In the Matter of the Estate of, &c., Deceased.	} Rule of Reference.
In administration in the Pro- bate Court of the County of	
San Francisco.	

On Filing the agreement of E. F., administrator of the above named estate, and of A. D., who makes claim against said estate for the sum of \$500, agreeing to refer said claim to J. T. Boyd, Esq., and on filing said claim, and the approval of the probate judge of this county, approving the appointment of said J. T. Boyd, as referee, the said claim is hereby referred to said J. T. Boyd, to hear and determine the same and make report thereon to this court.

NO. 80.

ORDER TO SHOW CAUSE AGAINST REVOCATION OF LETTERS ON FAILURE  
TO GIVE NOTICE TO CREDITORS. (§ 146.)

[Title, etc.]

It appearing to this court by the records thereof, that A. B., was duly appointed administrator of the estate of C. D., deceased, by the order of this court, etc., and that letters of administration were duly issued to him, and that he duly qualified, and became such administrator by taking the oath required by law and by filing a proper bond in accordance with the order of, and duly approved by, this court upon the same day, and that on said last mentioned day, an order was made by this court that the said A. B., administrator, publish at least once a week for the period of four weeks, in the San Francisco Herald, a newspaper published in the city and county of San Francisco, a notice to the creditors of deceased for the presentation of their claims against said deceased to said administrator, within ten months; and it further appearing to this court that two months have elapsed since said appointment and qualification as such administrator and the making of said order; and it further appearing by the affidavit of K. L., duly filed in this court, that said administrator has failed to publish said notice; it is therefore hereby ordered, that the said administrator show cause before this court, at etc., on etc., why his letters of administration should not be revoked.

M. N., Probate Judge.

NO. 81.

PETITION FOR SALE OF PERSONAL PROPERTY. (§ 150.)

[Title, etc.]

To the Honorable Probate Court, etc.

§ 150. The petition of A. B., administrator, respectfully sheweth, that there are claims against the estate of said deceased which have been duly presented and allowed by petitioner and this Honorable Court, amounting to the sum of \$1,000; that no money has come to the hands of your petitioner, except the sum of \$250, which has been paid out in the necessary expenses of administration, including the funeral expenses of deceased, and that for the payment of said claims and the further expenses of administration it becomes necessary to sell the personal property of said estate; that the said personal property is fully set forth in the inventory on file, to which reference is made.

Wherefore your petitioner prays for an order of sale, etc.

[Sworn to as in form No. 85.]

A. B. Administrator.

NO. 82.

ORDER OF SALE OF PERSONAL PROPERTY. (§151.)

[Title, etc.]

§ 150. An application having been made to this court by the petition of A. B., the executor, duly verified and filed herein, for the sale of the personal property of said estate, for the purpose of [state the object, § 150] and due notice of the hearing of said application and of the time and place thereof having been given by [state by posting or advertising, and the particulars thereof, if posting ten days, if advertising five days] and proof thereof being made to the satisfaction of this court and filed herein, and the same now coming on to be heard, in accordance with said notice, and said applicant appearing in person and J. M. appearing in opposition, being a legatee and claiming under the bequest of the deceased a portion of the personal property of said estate, being two horses, mentioned and described in the inventory on file, and after a full hearing of the matter it appearing to this court that a sale of the personal property of said estate is necessary for [here state the object, §150]:  
§ 151. It is hereby ordered that such sale be made by public auction at the house of said deceased, where said property is now present, and that notice of said sale, specifying the time and place thereof, be given by publication in the  
§ 180. , a news-



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paper published in the city and county of San Francisco, for ten days immediately previous to such sale; And it is further ordered that the said property so bequeathed to J. M. be reserved from sale until the residue of the personal [and real, § 180] property has been applied to the payment of the debts of the deceased.

M. N., Probate Judge.

### NO. 83.

#### REPORT OF PRIVATE SALES OF PERSONAL PROPERTY. (§ 152, see § 192.)

In the Matter of the Estate of James H. Wingate, Deceased.	}	In the Probate Court, City and County of San Francisco. State of California.
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Report of Administratrix sale of personal property.

In pursuance of an order of said court, made on the fifth day of October, A. D. 1857, authorizing said administratrix to sell a horse at private sale, and also of an order made on the second day of November, A. D. 1857, authorizing said administratrix to sell all the personal property at private sale, not set apart for the use of the administratrix, as surviving widow of said deceased, the said administratrix hereby reports:

That she has sold the said horse for the sum of \$150, being the highest price she was able to obtain therefor, and as she is advised the full value thereof; also that she has sold the wooden buildings situated on land at the southeast corner of Clay and Stockton streets, in said city of San Francisco, being 61 feet on Stockton street by 34 feet on Clay street, to Geo. B. Moore, for the sum of \$700, which she is advised is the full value of said buildings; and \$100, or thereabouts, more than the same were valued at by the appraisers of said estate, said buildings being on leased land and no other person offering a greater sum therefor.

Wherefore the said administratrix prays that said sales may be approved by the Judge of this Court, and that this report and said sales may be confirmed.

HELENA WINGATE, Administratrix.

### NO. 84.

#### ORDER CONFIRMING REPORT OF ADMINISTRATRIX. (§ 152.)

In the Matter of the Estate of James H. Wingate, Deceased.	}	In the Probate Court of the City and County of San Francisco.
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Order confirming report of administratrix.

On reading and filing the report of Helena Wingate, administratrix of the estate of James H. Wingate, of the sale of personal property, and the affidavit of Clinton P. Scovill, showing that said administratrix has obtained the full value of the property mentioned in the said report and it appearing to the court that the consideration has been paid to said administratrix:

It is hereby ordered, that the sale of the horse and buildings in said report mentioned be approved, and said sales are hereby confirmed, no objections having been made thereto, to wit: one horse and the wooden tenements at the southeast corner of Stockton and Clay streets, in San Francisco, being 61 feet on Stockton street and 34 feet on Clay street in San Francisco.

T. W. FREELON, County Judge.

### NO. 85.

#### PETITION FOR SALE OF PERSONAL PROPERTY. (§ 149, 150.)

In the Matter of the Estate of Jacob Arnold, Deceased.	}	In Probate Court.
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To the Hon. Thos. W. Freelon, Judge of the Probate Court of San Francisco County.

Your petitioner, Julia Ann Arnold, respectfully represents to your Honor, that she

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was by an order of your honorable court, made on the 11th day of December, A. D., 1854, appointed administratrix of the estate of her late husband, Jacob Arnold, deceased.

That she has returned to your honorable court, an inventory of the estate of said deceased, that the whole of said estate amounts, as appears by said inventory to the sum of eight hundred and thirty dollars, that the whole of the property is personal, and of a perishable nature, that your petitioner has two children, the issue of her marriage with the said deceased, and that she has no property, save her interest in said estate, and no other means, of support.

Wherefore, she prays that an order may be made authorizing her to sell by public auction the property of her said deceased husband, as shown by said inventory, to consist of the undivided one half interest in the building called "the San Francisco Baths," and the furniture and fixtures thereof. The same being necessary to pay the expenses of administration, and for the support of herself and family.

**JULIA ANN ARNOLD.**

January 23d, 1855.  
County of San Francisco, ss.

Julia Ann Arnold, being duly sworn, deposeth and saith, that she has heard read the foregoing petition, and knows the contents thereof; that the same is true of her own knowledge and belief.

**JULIA ANN ARNOLD.**

Sworn before me this 23d day of January, 1857.  
**DENIS LYONS**, deputy county clerk.

[For PROOF OF POSTING, NOTICE OF HEARING, (§ 150,) see form No. 17, *ante*.]

**NO. 86.**

**ORDER OF SALE PERSONAL PROPERTY. (§ 151.)**

In the Matter of the Estate	}	In Probate Court. San Francisco County.
of		
Jacob Arnold, Deceased.		

On reading the petition of Julia Ann Arnold, administratrix of the estate of said deceased, heretofore filed in this court, proof being made of the posting of notices of the day set for hearing the same, and it appearing upon full examination that a sale of the personal property of the deceased, is necessary, for the payment of the expenses of administration and the just claims against the estate and as well for the support of the family of the deceased.

It is by the court ordered, that the said Julia Ann Arnold, Administratrix as aforesaid be, and she is hereby authorized to sell by public auction, on the premises, to the highest bidder for cash, the interest of the said Jacob Arnold, deceased, in the "San Francisco Baths," consisting as appears by the inventory on file, of the one half of the building, bathing apparatus, furniture, steam engine, fixtures, etc.

**T. W. FREELON**, County Judge.

Dated, San Francisco, Jan. 29, 1854.

**NO. 87.**

**ORDER OF CONFIRMATION OF SALE OF PERSONAL PROPERTY. (§ 152.)**

In the Matter of the Estate	}	In Probate Court, City and County of San Francisco.
of		
Jacob Arnold, Deceased.		

On hearing the report of Julia Ann Arnold, administratrix of the estate of Jacob Arnold deceased, this day made to the court, of the sale of the personal property of said deceased, and the affidavits accompanying such report, and examination being made by the court of the value of the property of the said deceased, so sold by said administratrix, and it appearing to the court that said property on said sale realized its full value, and that a greater sum could not be obtained therefor:

It is by the court ordered and decreed, that the report of sale, as made by said Julia Ann Arnold, administratrix of the estate of Jacob Arnold deceased, of the personal property of said deceased, be and hereby is confirmed and allowed, and that

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the said administratrix make all proper and legal conveyance of said property so by her sold to the said Denis Lyons, the purchaser thereof, on his payment to her of the sum by him bidden for the same.

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T. W. FREELON, County Judge.

San Francisco, February 12th, 1855.

## NO. 88.

### APPLICATION FOR SALE OF PERISHABLE PROPERTY. (§ 150.)

In the Matter of the Estate }  
of } In the Probate Court,  
Joseph L. Folsom, Deceased. } of the City and County of San Francisco.

The undersigned executors of said last will and testament apply to the court for an order to sell as perishable property the articles embraced in the inventory and appraisement on file, under the title of household furniture, with the exception of the silver, engravings, table linen and bed linen, also the Tehama House furniture, and everything under the title "stable;" that the said property besides being exposed to fire is depreciating in value and a source of expense in its keeping, and therefore for the interests of the estate should be sold.

San Francisco, Oct. 1st, 1855.

ARCH'D C. PEACHY,  
P. WARREN VANWINKLE, Executors.

Henry W. Halleck, one of the executors, being now without the county of San Francisco, as he has been for some weeks past, is unable for that reason to sign the foregoing application.

San Francisco, Oct. 1st, 1855.

ARCH'D C. PEACHY,  
P. WARREN VANWINKLE, Executors.

## NO. 89.

### ORDER OF SALE OF PERISHABLE PROPERTY, (§ 150, 151.)

STATE OF CALIFORNIA, } In Probate Court.  
COUNTY OF SAN FRANCISCO. } October 1st, 1855.

Hon. Thomas W. Freelon, Judge.

In the Matter of the Estate }  
of }  
Joseph L. Folsom, Deceased. }

The written application on file of the executors for an order to sell as perishable property the articles embraced in the inventory and appraisement, on file under the title of "household furniture" (with the exception of the silver, engravings, table and bed linen), "Tehama House furniture" and "stable," having been presented to the court by the attorney of the executors, the attorney, Mr. Robert C. Rogers, of the minors interested in said estate and of persons residing out of the county of San Francisco, being present and the court having considered the matter: It is ordered that the application be granted, and that the executors sell at public auction, giving notice pursuant to the provisions of the statute, the articles embraced in the inventory and appraisement on file under the titles of "household furniture" (with the exception of silver, engravings, table and bed linen), "Tehama House furniture" and "stable," the same being deemed perishable.

T. W. FREELON, County Judge.

The foregoing order agreed to.

ROBT. C. ROGERS,  
Attorney of Minors interested in the estate, and persons  
residing out of the county of San Francisco.

FREDERICK BILLINGS,  
Attorney for Executors.

NO. 90.

ORDER OF SALE, EITHER PRIVATE OR AT AUCTION. (§ 152.)

State of California, San Francisco County: *ss.*

In the Matter of the Estate }  
of } In Probate Court.  
Wm. H. Moylan, Deceased. }

On reading the petition of Mary Anne Moylan, administratrix of the estate of William H. Moylan, deceased, praying for an order to sell certain personal property of the estate of said deceased.

It appearing to the court upon examination of the facts and circumstances connected therewith, that a sale of said personalty is necessary to pay the expenses of administration and for the support of the family of the deceased.

It is ordered, that said administratrix sell at private sale, or by public auction, after giving notice, if sold by public auction, of the time and place of sale, the following described personal property, viz: one old iron safe, one common bedstead, one old carpet, one single iron bedstead, one sausage machine, one grindstone, two common beef trays, one chopper, one saw, one pair beam steelyards, one pair steel-yards, and one meat rack.

And that upon making sale of the aforesaid articles, the administratrix report the same to this court.

San Francisco, May 18th, 1857.

NO. 91.

PETITION FOR ORDER SALE BY PUBLIC ADMINISTRATOR. (§ 88, 149.)

State of California, San Francisco County.

To the Hon. Thomas W. Freelon, County Judge, and Judge of the Probate Court of San Francisco county.

Your petitioner, Robert C. Rogers, public administrator of San Francisco county, respectfully sheweth unto your Honor, that by virtue of his office, and in accordance with the statute, in such case made and provided, he has taken charge of the estate of one James Sullivan, who died in the city of San Francisco, on the first day of June, A. D., 1857, intestate, as your petitioner is informed and believes, without known heirs.

That said estate consists of two carriages, two horses of the value of about three hundred dollars, that there are claims existing against said estate for expenses of last illness, of funeral, for living of the said horses, repairs of a carriage, and other claims, which your petitioner has not sufficient knowledge of to now define.

That the keeping of the horses entails a useless expense on the estate, that an inventory of the estate is herewith presented.

Your petitioner, in consideration of the premises, prays that an order may be granted him to sell the property mentioned in the inventory at public auction.

ROBERT C. ROGERS, P. A.

San Francisco, June 9th, 1857.

State of California, City and County of San Francisco, *ss.*

Robert C. Rogers being duly sworn, says, that he has read the foregoing petition, and knows the contents thereof, that the same is true of his own knowledge, except as to the matters stated on information and belief, and as to these matters, he believes it to be true.

ROBERT C. ROGERS.

Sworn to and subscribed before me, this 16th day of June, 1857.

DENIS LYONS, deputy county clerk.

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## NO. 92.

### ORDER FOR PRIVATE SALE. (§ 152.)

State of California, San Francisco County.

In the Matter of the Estate }  
of } In Probate Court.  
Francis X. Aubrey, Deceased. }

This day having been appointed for hearing the application of Jose Francisco Chavis, administrator of the estate of said decedent, praying for an order to sell the personal property of said estate; proof having been made by affidavit of the posting of notices of such application as heretofore ordered, and that a sale of said personal property is necessary to close the administration of said estate.

It is ordered, that said administrator sell at private sale the personal property returned in the inventory of said estate, viz: six shares of the Capital Stock of the California Steam Navigation Company.

San Francisco, August 3, 1857.

## NO. 93.

### PETITION FOR SALE PERSONAL PROPERTY. (§ 149, 150.)

State of California, County of San Francisco.

In the Matter of the Estate }  
of } In the Probate Court  
Rob't. Greenhow, Deceased. } of the County of San Francisco.

The petition of Hall McAllister, executor of the above named decedent, respectfully shows, that the said Robert Greenhow, departed this life on the twenty-seventh day of March, in the year 1854, leaving a will in which your petitioner was duly appointed the executor of said deceased. That subsequently, said will was duly admitted to probate by this honorable court, and letters testamentary duly issued thereon to your petitioner as executor thereof. Your petitioner further showeth, that the decedent left no real estate, and that he has discovered that the personal estate of said decedent is insufficient to pay his debts.

Your petitioner further showeth that all the personal estate of said deceased are cash assets, save nine shares of the stock of the San Francisco and Mission Dolores Plank Road Company, and that the sale of said nine shares is necessary for the payment of bona fide claims against the estate of said Robert Greenhow, deceased.

Your petitioner further showeth that the said decedent in his said will, devised and bequeathed all his estate to Mrs. Rose O'Neil Greenhow, his wife, and that the said Mrs. Rose O'Neil concurs in the prayer of this petition.

Therefore, your petitioner prays for an order of this honorable court, authorizing the sale in due form of law of aforesaid nine shares of the stock of the San Francisco and Mission Dolores Plank Road Company; and your petitioner will ever pray.

HALL McALLISTER,  
Executor of R. Greenhow, deceased.

Dated, San Francisco, July 21st, 1856.

County of San Francisco, ss.

On the 21st day of July, 1856, personally appeared before me, Hall McAllister, the foregoing petitioner, who being by me duly sworn, did depose and say, that he has read the foregoing petition by him subscribed, and knew the contents thereof, and that the same was true of his own knowledge, excepting as to the matters therein stated on his information and belief, and as to these matters, he believed it to be true.

DENIS LYONS, Deputy Clerk.

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NO. 94.

ORDER TO SHOW CAUSE ON SAME. (§ 150.)

State of California, County of San Francisco.

In the Matter of the Estate	}	In the Probate Court
of		of the County of San Francisco.
Robert Greenhow, deceased.		

Upon reading and filing the petition of Hall McAllister, executor of the last will and testament of Robert Greenhow, deceased, for authority to sell certain personal property of said deceased, namely: nine shares of the stock of the San Francisco and Mission Dolores Plank Road Company, for the payment of the debts of said decedent; it is ordered, that all persons interested in the estate of the said Robert Greenhow, deceased, appear before the probate court of the county of San Francisco, at the court room thereof, in the city hall, of the city of San Francisco, on the 28th day of July, A. D. 1856, at eleven o'clock, in the forenoon of that day, then and there to show cause why authority should not be given to the said executor to sell the aforesaid personal property; and it is ordered, that a copy of this order be published in "the San Francisco Daily Sun," a newspaper of aforesaid county, for five successive days previous to said 28th day of July, A. D. 1856.

T. W. FREELON, County Judge.

Dated, San Francisco, July 21st, 1856.

NO. 95.

ORDER OF SALE, PERSONAL PROPERTY. (§ 151, 152, 153.)

In the Matter of the Estate	}	In the Probate Court
of		of the County of San Francisco,
Robert Greenhow, Deceased.		State of California.

Hall McAllister, the duly qualified executor of aforesaid Robert Greenhow deceased, having heretofore presented his application for authority to sell certain personal property of the estate of said deceased, namely, nine shares of the stock of the San Francisco and Mission Dolores Plank Road Company, for the purpose of paying therewith *bona fide* claims against the estate of said decedent; And an order having been made on the 21st day of July, A. D. 1856, that all persons interested in the estate of said Robert Greenhow, deceased, should appear before this court, at the court room thereof, in the City Hall of the city of San Francisco, on this 28th day of July, A. D. 1856, at eleven o'clock in the forenoon of this day, then and there to show cause why authority should not be given to the said executor to sell the aforesaid personal property; and further, that a copy of said order should be published in the San Francisco Daily Sun, a newspaper of aforesaid county, for five days previous to said 28th day of July, A. D. 1856.

Now upon due proof of publication being made as ordered, and the same application being duly heard, it is hereby ordered that the aforesaid nine shares of the San Francisco and Mission Dolores Plank Road Company be sold at public auction at the salesroom of Messrs. Selover, Sinton & Co., on the north side of Merchant street, between Kearny and Montgomery streets, in the city of San Francisco, on Monday, the eleventh day of August, A. D. 1856, at 12 o'clock, noon, of that day; and that a copy of this order be published for ten days previous to said eleventh day of August, in the San Francisco Daily Sun, a newspaper of aforesaid county.

Dated San Francisco, July 28th, 1856.

T. W. FREELON, County Judge.

NO. 96.

ORDER CONFIRMING SALE MADE UNDER DIRECTION OF THE WILL.  
(§ 178.)

[In the Matter of, etc.]

The executor herein having, in accordance with the direction of the will of said deceased made sales of certain personal and real estate, and having made his report

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thereon to this court under oath, accompanied with proofs to the satisfaction of the court, that due notices were given and published according to law, and the said proceedings on such sales being examined by this court, and it appearing that said sales were legally made and fairly conducted, and that the respective sums bid were not disproportionate to the value of the property sold, and that said proceedings were in all respects according to law :

It is ordered that said sales be confirmed, and that conveyances be executed as to the real estate so sold, to the purchasers thereof, as named in said report of sale.

[Dated, etc.]

M. N., Probate Judge.

## NO. 97.

### PETITION FOR SALE OF REAL ESTATE. (§ 154, 155.)

STATE OF CALIFORNIA, }  
IN AND FOR THE COUNTY OF SAN FRANCISCO, } In the Probate Court.

To the Hon. T. W. Freelon, Probate Judge in and for said county.

Your petitioner, James Bowman, executor of the last will and testament of William Cumberland, deceased, represents unto your Honor, that said William Cumberland, was, immediately previous to his death a resident of this county and state, and that he departed this life off the coast of Costa Rica, in Central America, on or about January, A. D. 1856, leaving a will, which will has been duly proven, and is now on file in the office of the clerk of this Honorable court, all of which will more fully appear by reference thereto; that said deceased died, leaving the estate herein-after referred to, and more particularly set out and described in the exhibits and schedules hereunto annexed, and expressly made part of this petition.

That your petitioner is informed and believes, that John Cumberland, named in said will, the brother of the said deceased, is by the terms thereof, sole devisee of the deceased; that he now resides in the city of London, England, and that John Cumberland is now about the age of fifty years, and that your petitioner knows of no other heir of the said deceased.

That your petitioner knows of no personal property owned or possessed by the said testator at the time of his decease.

That he is informed and believes that said Cumberland died seized of the real estate, situate in the county of San Francisco, a full description of which, together with the condition and value of the respective portions and lots is contained in the schedule hereunto annexed marked "A," and made a part of this petition.

That letters testamentary were duly issued to your petitioner on said estate, by this Honorable Court, on the day of May, A. D., 1856, and your petitioner has duly qualified, according to law, and entered upon the administration of said estate.

Your petitioner further represents that the schedule hereunto annexed, marked "B," and also made part hereof, sets forth the debts outstanding against the estate and said deceased, as far as the same can be ascertained by your petitioner, and that no personal estate whatever has come, or now is in the hands of your petitioner for the payment of the debts of the said estate.

That the expenses of the administration of said estate will amount to a large sum to wit: about, or near the sum of five hundred dollars.

Your petitioner therefore alleges, that it appears from the facts aforesaid, and he avers that there is not sufficient personal estate in the hands of your petitioner, or in existence, to his knowledge or information, to pay the said debts outstanding against the said deceased and the expenses of the administration, and that it is necessary to sell the whole or greater portion of the said real estate for the payment of the debts allowed and approved against the said estate, which now amount to a large sum, to wit: about six thousand dollars.

Wherefore, your petitioner prays your Honor for an order, directing all persons interested to appear before your Honor, at a time and place to be specified in said order, not less than four nor more than ten weeks, from the time of making said order, to show cause why an order should not be granted authorizing and requiring your petitioner to sell so much of the real estate aforesaid of the deceased as shall be necessary to pay said debts so outstanding against the deceased as aforesaid, and that, at the time and place appointed in said order to show cause, or at such

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time as the hearing may be adjourned to, on due proofs, and after a full hearing according to the statute in such case made and provided, an order of sale authorizing your petitioner to sell the whole, or so much and such parts of the real estate aforesaid as may be judged necessary, (for the purposes aforesaid, and to pay the debts, so outstanding as aforesaid, together with the expenses of administration) or beneficial, or that such other or further order may be made as is meet in the premises.

HOGG & WILSON,  
Attorneys for Petitioner.

San Francisco, July, 1856.

State of California, County of San Francisco, ss.

James Bowman, the petitioner above named, being duly sworn, deposes and says, that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

JAMES BOWMAN.

Subscribed and sworn to before me this 11th day of August, A. D., 1856.

DENIS LYONS, deputy clerk.

[Here follow the schedules referred to in the petition.]

NO. 98.

ORDER TO SHOW CAUSE ON SUCH APPLICATION. (§ 156, 157 and see § 164.)

In the Matter of the Petition of James  
Bowman, executor of the last Will  
and Testament of William Cumber-  
land, deceased, for a sale of the Real  
Estate of the said deceased.

In the Probate Court  
of the County of San Francisco,  
State of California.

It appearing by the petition of the said executor that there is not sufficient personal estate in his hands to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts:

It is therefore ordered by the Judge of said court, that all persons interested be and appear before him at the court room of said Probate Court on Monday, the 22d day of September, A. D. 1856, at 11 o'clock, A. M. of that day [that time being specially appointed for the hearing of said petition], to show cause why an order should not be granted to the said executor to sell so much of the real estate of the deceased as should be necessary to pay such debts, and that a copy of this order be published at least four successive weeks in \_\_\_\_\_, a newspaper printed and published in the city of San Francisco.

August 18th, 1856.

T. W. FREELON, County Judge.

NO. 99.

ORDER OF SALE OF REAL ESTATE. (§ 158, 161, 162, 163, 78.)

In the Matter of the Estate  
of  
William Cumberland, Deceased.

In the Probate Court  
in and for the County of San Francisco,  
State of California.

It appearing to the court, upon the application of James Bowman, executor of the last will and testament of William Cumberland, deceased, that he presented to and filed in this court at the August term thereof, A. D. 1856, his petition in writing duly verified, showing that claims had been allowed against the said estate, and that there is not sufficient personal estate in the hands of the said executor to pay the debts outstanding against the deceased and the expenses of administration and that it is necessary to sell the whole of the real estate for the payment of such debts; And upon such petition and application of said executor, it having been at said August term, 1856, ordered by the Judge of this court that all persons interested should be and appear before him at the court room of said Probate Court on Monday the 22d day of September, A. D. 1856, at eleven o'clock, A. M., of that day [that time being specially appointed for the hearing of said petition] to show cause



why an order should not be granted to the said executor to sell so much of the real estate of the deceased as shall be necessary to pay such debts, and that a copy of the said order to show cause should be published at least four successive weeks in a newspaper published in the city of San Francisco; And on that day, at the time and place named in the said order, to show cause, upon due proof of the publication of a copy of the said order to show cause in pursuance thereof.

The court having fully heard and examined the allegations and proofs of the petitioner, and no person having opposed the same, and it appearing to the court upon such hearing and examination and proofs that claims to a large amount have been duly allowed and established against said estate and are justly due by said estate to divers persons, and that a sale of property is necessary for their payment, and it further appearing to the court that there is not sufficient personal property in the hands of the said executor to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole of the real estate for the payment of such debts, and it further appearing that no good reason exists why the said order of sale should not be granted as prayed for in said petition; Now, on this 22d day of September, A. D. 1866, it is ordered and adjudged by the court that said James Bowman, executor as aforesaid, be and he is hereby authorized to sell the following real estate of said William Cumberland deceased, at public auction to the highest bidder, on the following terms, to wit: for cash at the time of sale, to be paid on the day of sale or the day following.

And it is further ordered that before making such sale the said James Bowman, executor as aforesaid, shall give an additional bond with two or more sufficient sureties, in the penal sum of five thousand dollars, conditioned that the said executor shall faithfully execute the duties of the trust according to law.

That the said executor shall give notice of the time and place of holding such sale, according to the statute in such case made and provided, and shall in all things proceed, conduct and manage said sale as by the statute in such case is made and provided, is directed and required, and due return of his proceedings to the Probate Judge in and for the said county of San Francisco make, at the next term of the probate court after such sale.

The following is the real estate hereby authorized to be sold, being situated in the county of San Francisco and State of California, viz:

1. The undivided half of the lot situate, lying and being in the city of San Francisco, known and described on the one hundred vara survey thereof as the one hundred vara lot number one hundred and sixty-one [161.]
2. The one undivided half of a lot of land situated in the county of San Francisco, at the Mission Dolores, and formerly occupied by said Cumberland and John Hart, also since deceased, as a milk ranch, with buildings thereon, the lot being fifty varas square.
3. The one undivided half in a certain pre-emption claim near the Mission Dolores, taken up and occupied jointly by said Cumberland and Hart, both deceased.

T. W. FREELON, County Judge.

### NO. 100.

#### RETURN OF PROCEEDINGS ON SALE. (§ 169.)

To the Honorable Probate Court, in and for the county of San Francisco, State of California:

James Bowman, executor of the last will and testament of William Cumberland, deceased, represents to this Honorable Court, that at the September term of this court, viz: on the 22d day of September, 1866, an order of sale was duly made, on the application of this petitioner, of the real estate belonging to the estate of said William Cumberland deceased, which real estate is mentioned and referred to herein below and in the schedule hereunto annexed and made part hereof, as by the records and files of this hon. court will more fully appear, reference thereunto being had.

That in pursuance of said order of sale and the statute in such case made and provided, your petitioner, through John Middleton, an auctioneer, did make the sales respectively and separately of the said lands and premises in the schedules hereunto annexed, mentioned and described, and to the persons therein opposite each piece named and for the prices therein set forth; that said sale was made after due notice according to the statute in such case made and provided, and at public auction at the auction room of said John Middleton, in the city of San Francisco,

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on Monday, November 10th, A. D. 1856, at 12 o'clock, M.; that said purchasers were respectively the highest bidders for cash at the time of the sale.

That said sale was legally made and fairly conducted, as your petitioner is informed and believes, and that the sums respectively bid were not disproportionate to the value of the property sold, and that he is informed and believes that no sums respectively exceeding such bids, to the amount of ten per centum, exclusive of the expenses of a new sale, could be obtained on another sale on said order.

And your petitioner further represents that the schedules hereunto annexed, marked "A," "B" and "C," show to the court a correct account of said sales, including the amounts respectively bid for such real estate, the expenses of conducting such sales and the net proceeds:

Wherefore your petitioner prays that this Hon. Court will make an order confirming the said sales and directing conveyances to be executed respectively to the said purchasers, conveying all the right, title, interest and estate of the said testator in the premises respectively at the time of his death.

And further, that the account of sales herewith furnished be also filed, approved and allowed by this Hon. Court.

JAMES BOWMAN, Executor, etc.,  
By HOGG & WILSON, his Attorneys.

State of California, City and County of San Francisco, ss.

James Bowman, executor of the last will and testament of William Cumberland, deceased, being duly sworn deposes and says that he has read the foregoing petition, return and account of sales, and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes them to be true.

Sworn to and subscribed before me, this 17th  
day of November, A. D. 1856,  
DENIS LYONS, Deputy County Clerk. }

JAMES BOWMAN.

### NO. 101.

#### ORDER CONFIRMING SALE OF REAL ESTATE. (§ 171, 173, 166, 167.)

In the Matter of the Estate of William Cumberland, Deceased. }	In the Probate Court, in and for the County of San Francisco, State of California.
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It appearing to the court, on the application of James Bowman, executor of the last will and testament of William Cumberland deceased, and by the return and account of sales by said executor, that in pursuance of the order of sale of the real estate of said testator, heretofore made, that said executor on the tenth day of November, A. D. 1856, at twelve o'clock, M., sold the premises hereinafter described to the persons and for the prices hereinafter mentioned, viz:

- |  |            |
|--|------------|
| 1. The undivided half of the lot situate, lying and being in the city of San Francisco, known and described on the one hundred vara lot number one hundred and sixty-one [161] to Falkner, Bell & Co., for   | \$2,500 00 |
| 2. The one undivided half of the lot of land situate in the county of San Francisco, at the Mission Dolores, and formerly occupied by said Cumberland and John Hart, since deceased, as a milk ranch, with the buildings there on, being fifty varas square, to Frederick Green, for | 250 00     |
| 3. The one undivided half of a certain pre-emption claim near the Mission Dolores, taken up and occupied jointly by said Cumberland and Hart, both deceased, to Frederick Green, for   | 25 00      |
| Total gross proceeds, - - -  | \$2 775 00 |

And it further appearing and having been proven, to the satisfaction of the court that due notice of the time and place of holding said sale was posted up in three of the most public places in the said county of San Francisco, and published in the Daily Alta California, a newspaper printed and published daily in said county, for three weeks successively next before said sale, describing the said lands and ten-

ements with common and sufficient certainty, and that said sale was made at public auction in the city of San Francisco, and in all things in conformity with the statute in such case made and provided, and that the said purchasers were respectively the highest bidders and that they have respectively complied with the terms of sale; and it furthermore appearing to the court that said sale was legally made and fairly conducted, and that the sums respectively bid were not disproportionate to the value of the property sold, and that no sums exceeding the said respective bids can be obtained on another sale; and no person interested in the estate having filed or made any written objections to the confirmation of the said sale:

It is therefore ordered by the court, that the said sales to said respective purchasers be and the same are hereby respectively approved and confirmed, and the said executor is hereby ordered and directed to execute and deliver to the said respective purchasers, deeds and conveyances for the respective parts by them purchased, conveying to them respectively all the right, title, interest and estate of the said testator in the premises at the time of his death.

T. W. FREELON, County Judge.

NO. 102.

OFFER OF TEN PER CENT ADVANCE ON SALE. (§ 169, 170.)

In the Matter of the Estate	}	In Probate Court,
of		City and County of San Francisco,
James H. Wingate, Deceased.	}	State of California.

The petition of J. Mora Moss respectfully shows, that he is of opinion that the water lot known as lot six hundred and sixty-one [661] on the official map of the city of San Francisco, sold by order of the probate court of this county to O. Pratt, Esq., by John Middleton, auctioneer, by direction of the administratrix of James H. Wingate's estate, for the sum of \$875, at his late sale on the 19th day of April, A. D. 1858, was sold for a sum disproportionate to its true value, and the subscriber hereby offers to give for said lot an advance on said bid and sale, a sum of at least ten per cent., exclusive of the expenses of a new sale, should this court direct such sale to be made, and the subscriber will insure the same; and the subscriber further says, that he is agent for the parties holding the mortgage on said lot.

J. MORA MOSS.

Dated May 17th, 1858.

NO. 103.

ORDER OF RE-SALE. (§ 169.)

In the Matter of the Estate	}	In the Probate Court,
of		City and County of San Francisco,
James H. Wingate, Deceased.	}	State of California.

Upon reading and filing the report of sales made by Helena Wingate, administratrix of the estate of James H. Wingate, in pursuance of the order of this court, made on the 28th day of December, A. D. 1857, and it appearing to the court that such sale was legally and fairly made, and that so much of the property designated in said report as sold to Philip McShane, for the sum of \$760, being the water lot known as lot numbered (756) seven hundred and fifty-six, on the official map of said city of San Francisco, was sold for a sum not disproportionate to its value, and no objections having been made to the confirmation of said sale, and on motion of Annis Merrill, attorney for said administratrix, it is ordered, adjudged and decreed, that the said sale of said water lot, numbered (756) seven hundred and fifty-six, on the official map of said San Francisco, be, and the same hereby is confirmed and declared valid, and the said administratrix is hereby ordered and directed to make conveyance of the same to the said Philip McShane, his heirs and assigns, as required by law.

And it appearing to the court, that so much of said property mentioned in said report as described to be the water lot numbered (661) six hundred and sixty-one on the official map of said San Francisco, sold to O. C. Pratt, for the sum of \$875,

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was sold for a sum disproportionate to its true value, and that a sum exceeding said bid therefor of at least ten per cent, exclusive of the expenses of a new sale may be obtained for said lot, and on motion of Annis Merrill, counsel for said administratrix, it is hereby ordered, adjudged and decreed, that said sale be, and the same hereby is vacated, and the said administratrix is hereby authorized and directed to sell, or cause to be sold, at public auction, according to law, to the highest bidder for cash, at some public place, in the city and county of San Francisco, after giving the notices of the time and place of sale as required by the statute, all that water lot, designated on the official map of the city of San Francisco as lot numbered (861) six hundred and sixty-one, and that said administratrix report said sale to this court as required by the statute in such case made and provided.

May 17th, 1858.

M. C. BLAKE, Probate Judge.

### NO. 104.

#### REPORT OF SALE. (§ 169.)

In the Matter of the Estate } In the Probate Court  
of }  
Elisha Standish, Deceased. } for the City and County of San Francisco.

The undersigned, Benjamin Brewster, administrator of said estate, respectfully reports,—

That in pursuance of an order of this court, made and entered on the ninth day of March, A. D. 1857, he sold on the sixth day of April, A. D., 1857, at public auction, to the highest bidder for cash (due and legal notice of the time and place of making said sale, having been given as required by statute as will fully appear by affidavits on file) the following described real estate, belonging to the estate of Elisha Standish, deceased, to wit:

That certain piece or lot of land situate in the city of San Francisco, on the northerly side of Union street, between Powell and Mason streets, commencing etc., to John Benson, Esq., for the sum of four hundred and twenty-five dollars, he being the highest bidder therefor, and said sum being the highest amount bid for said property.

That said sale was fairly conducted, and that the said sum bid was not disproportionate to the value of said property.

The undersigned, therefore prays that said sale be confirmed by an order of this court, and that the court direct a conveyance of said property to be executed to said purchaser.

San Francisco, May 18th, 1857.

BENJ. BREWSTER.

Sworn to and subscribed before me, this 8th day of May, A. D. 1857.

F. J. THIBAUT, Notary Public.

### NO. 105.

#### OBJECTIONS TO CONFIRMATION OF SALE. (§ 170.)

In the Matter of the Estate } In Probate Court,  
of }  
P. B., Deceased. } of the County of San Francisco, State of California.

M. N., respectfully represents to the court, that at the sale advertised in and by the printed notice hereto annexed, held at the auction rooms of John Middleton, in this city, at 12 o'clock, M., he did bid for the land therein described, the sum of \$3,000, which being the highest bid therefor, he became the purchaser of said land, and was so announced at said sale.

That his purchase as aforesaid was of an indefeasible estate in fee, but that since said sale, and not before, and by the advice of his counsel, he is advised, and has ascertained that the title attempted to be sold as aforesaid, is defective.

1st. Because, on the hearing of the petition for probate of the will in the estate aforesaid, no attorney was appointed to represent the non-residents and minors interested in said estate, although it appears by said petition that there were such non-residents and minors.

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2d. That the witness did not testify at said hearing that the execution of said will by the decedent said P. B., deceased, was without fraudulent representations, according to the statute in such case made and provided.

3d. It does not appear that a copy of the order to show cause upon petition therein for sale of real estate was served upon the guardian of the heirs of decedent.

The said M. N., purchaser as aforesaid, excepts to the proceedings aforesaid, and the report of said sale upon the grounds above specified.

Dated, San Francisco, Dec. 14, 1857.

M. N.

By his attorneys, SAUNDERS & HEPBURN.

### NO. 106.

#### ORDER OVERRULING OBJECTIONS.

In the Matter of the Estate }  
of  
P. B., Deceased. }

And now, January 11th, 1858, the court having duly considered the exceptions filed by M. N., heretofore, to wit: on the 14th December last, to the confirmation of the sale of the real estate of said deceased. It is ordered adjudged and decreed that the same be, and they hereby are overruled.

T. W. FREELON, County Judge.

### NO. 107.

#### ORDER AFTER CONTEST, CONFIRMING SALE. (§ 171.)

In the Matter of the Estate }  
of  
P. B., Deceased. } In Probate Court.  
City and County of San Francisco.

An order having been duly made by the probate court of the city and county of San Francisco, on the 16th day of November, 1857, authorizing A. B., the executrix of the last will and testament of P. B., deceased, to sell the real estate, whereof the said testator died seized, mentioned and described in the said order, to enable her to pay the mortgage debt therein mentioned, and the said executrix having made return of her proceedings upon the said order, by which said return it appears that under said order, the said executrix, after having posted and published due notice of the time and place of holding said sale according to law, did, on the 9th day of December, 1857, at 12 o'clock, noon of that day, at the auction room of John Middleton, in the said city and county of San Francisco, being the time and place mentioned in said notice, sell at public auction, the whole of the premises mentioned and described in said order, and that she did, on said sale, sell the premises described in said order as follows:

To M. N., for the sum of \$3,000, that being the highest and best price bid, and he being the highest and best bidder for the same.

And the said M. N. having heretofore filed his written objections to the confirmation of sale, which having been duly agreed by his attorneys, Saunders & Hepburn, and by Sidney V. Smith, attorney for the said executrix, and the same having been, after full consideration thereof by the court, overruled.

Now, the said executrix having this day appeared before the said probate court by Sidney V. Smith, her attorney, and having moved for an order confirming said sale, and no one appearing to make opposition to the confirmation thereof, and it being shown to the court that no objection in writing to the confirmation of said sale have been filed, except those so as aforesaid filed by the said M. N., and so as aforesaid overruled by the court; and the court having examined the proceedings upon the aforesaid order of sale, and it appearing to the court that the said sale was legally made and fairly conducted, and that the same bid was not disproportionate to the value of the property sold. It is ordered and decreed, and the court, pursuant to the provisions of the statutes, in such case made and provided, does hereby order and decree, that the said sale of the said real estate, so as aforesaid made by

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the executrix, be, and the same is hereby confirmed. And the court does further order and direct the said A. B., executrix as aforesaid, to execute a conveyance of the said real estate so sold by her, to the said M. N., the purchaser thereof.

In open court, this 18th day of January, 1858.

T. W. FREELON, County Judge.

NO. 108.

RETURN OF SALE BY GUARDIAN WITH PROOFS OF NOTICE. (§ 169, 166, 167, 173.)

WEDNESDAY, March 24th, at 12 o'clock, M.—GUARDIAN'S SALE.—In the probate court of the city and county of San Francisco, state of California.—In the matter of the estate of Henry B. Lafitte, an insane person.

"A." Notice is hereby given, that, in pursuance of an order of the probate court of said city and county, made the 1st day of March, A. D., 1858, the undersigned, Guardian of said insane person, will sell at public auction, to the highest bidder, on Wednesday, the 24th day of March, 1858, at 12 o'clock, M., at the auction room of H. A. Cobb, No. 102 Montgomery street, the following described real estate, situate, lying, and being in said city and county, etc.

H. A. COBB, Guardian.

State of California, City and County of San Francisco, ss.

R. H. Sinton, being first duly sworn, deposes and says, that he resides in the city of San Francisco; that he assists in the real estate department of the auction house of H. A. Cobb, 102, Montgomery street, that he posted exact and true copies of the annexed advertisement of sale in three most public places in said city, from March (2nd) second, 1858, to the (24th) twenty-fourth of the same month, inclusive. That he attended said sale, that the attendance thereat, and the bidding, was good, and that the sum at which said property was knocked down, was the best price that could have been obtained for the same.

R. H. SINTON.

Sworn and subscribed to before me, this 29th day of March, A. D., 1858.

GEO. T. KNOX, Notary Public.

WEDNESDAY, March 24th, at 12 o'clock, M.—GUARDIAN'S SALE.—In the probate court, city and county of San Francisco, State of California.—In the matter of the estate of Henry B. Lafitte, an insane person.

"B." Notice is hereby given, that, in pursuance of an order of the probate court of said city and county, made the 1st day of March, A. D. 1858, the undersigned, Guardian of said insane person, will sell at public auction, to the highest bidder, on Wednesday, the 24th day of March, 1858, at 12 o'clock, M., at the auction room of H. A. Cobb, No. 102 Montgomery street, the following described real estate, situate, lying, and being in said city and county, etc.

H. A. COBB, Guardian.

State of California, City and County of San Francisco, ss.

Robert White, of the city and county of San Francisco, being duly sworn, deposes and says, that he is the principal clerk in the office of the printer and publisher of the San Francisco Herald, a daily and weekly newspaper, published daily in the city of San Francisco, in the county aforesaid, and has charge of the advertisements therein; that a notice, of which the annexed is a printed copy, has been regularly published in the said paper at least three successive weeks, commencing on the 2d day of March, 1858, and ending on the 24th day of March, 1858.

ROBERT WHITE.

Subscribed and sworn before me, this 27th day of March, 1858.

F. J. THIBAUT, Notary Public.

In the Matter of the Estate of Henry B. Lafitte, an insane person.	}	Probate Court, in and for the City and County of San Francisco.
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To the Hon. Thomas W. Freelon, County Judge, and *ex-officio* Probate Judge in and for the City and County of San Francisco.

Henry A. Cobb, guardian of the person and estate of Henry B. Lafitte, an insane person, respectfully represents that, pursuant to an order heretofore on the 1st day

of March, A. D. 1858, entered in said proceeding, authorizing the sale of certain real estate therein described, he caused a notice of the time and place of such sale to be posted in three of the most public places in the city and county of San Francisco; also to be published in the San Francisco Herald, a newspaper published in said city and county, for three weeks successively, next before such sale, as will appear by the two affidavits hereto annexed, and made a part of this report and marked respectively "A" and "B"; that on the day, in said notices mentioned, viz: the 24th day of March, A. D. 1858, at 12 o'clock noon of said day, between the hours of nine o'clock in the morning, and the setting of the sun, at the auction rooms of H. A. Cobb, number 102 Montgomery street, in said city and county of San Francisco, did sell at public auction, said premises, described in said order of sale, as follows: together with the buildings thereon, to Jacob Williams, for the sum of twenty-two hundred dollars, that being the highest sum bid for the same,

And the said guardian doth further report and return to your Honor, that the said sale was in all respects legally made and fairly conducted.

All which is respectfully submitted.

H. A. COBB, Guardian.

Dated March 29th, 1858.

NO. 109.

ORDER FOR RE-SALE ON FAILURE OF PURCHASER TO TAKE HIS DEED. (See § 171 and note.)

In the Matter of the Guardianship of Henry B. Lafitte, an insane person. }	In the Probate Court of the County of San Francisco.
--	---

In Open Court, October 27th, A. D. 1856.

And now comes Henry A. Cobb, guardian of the person and estate of the above named Henry B. Lafitte, and presents his petition to this court, showing that the sale of the real estate of Henry B. Lafitte, heretofore named by him the said guardian under an order of this court, entered on the 21st day of July, 1856, has become ineffectual for the reason that the purchaser at said sale has refused to comply with the terms thereof; and further, that he is an irresponsible person, and unable to pay for the property by him purchased at said sale, and it appearing to the satisfaction of the court, that the said purchaser has refused to comply with the terms of said sale, and also that he is unable to pay for said property and is wholly irresponsible: It is therefore ordered, that the sale of the property of said Henry B. Lafitte made by Henry A. Cobb, his guardian, to one B. Carman, on the 23d day of August, 1856, be and the same is hereby vacated, set aside and annulled; and it is also ordered, that the order of this court, made on the first day of September, 1856, confirming said sale, be and the same is hereby set aside and annulled; And it is further ordered, that the said Henry A. Cobb, guardian of the said Henry B. Lafitte, be authorized and empowered and he is hereby directed to re-sell said property under the order of this court, entered on the 21st day of July, 1856, and to do all things needful and proper in the premises under said order, as fully as though the said sale, and order confirming the same, had not been made.

T. W. FREELON, County Judge.

NO. 110.

OBJECTIONS TO GRANTING ORDER OF SALE. (§ 170.)

In the Matter of the Petition of Abia A. Selover, for an order to show cause why an order of sale of the real estate of Jas. Beckett, deceased should not be made, etc. }	In the Probate Court of the County of San Francisco.
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To Thomas W. Freelon, Esquire, Probate Judge of the County of San Francisco:

James J. Beckett, an infant under the age of fourteen years, and the sole heir-at-law of the said James Beckett deceased, by Charles Gallagher, his guardian, shows for cause why the order in the petition of Abia A. Selover, prayed for, should not

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be granted, the following objections and allegations of law and fact. And first he shows these objections of law, viz :

1. That the said petitioner does not set forth facts sufficient to authorize the order prayed for.

2. That it does not show that the said Selover is a party entitled to petition for a sale of the said real estate.

3. That it does not show that any administrator of the said estate has been duly appointed and qualified.

4. That it does not show that the administrator of the said estate has ever accounted for his administration, nor that any proceedings have been taken to compel him to account.

5. That it does not show that the said petitioner has a valid or any claim against the said estate.

6. That it does not set forth facts sufficient to give this court jurisdiction of the application made by the said Selover for a sale of the real estate.

7. That it does not show with sufficient or any certainty, that the personal estate in the hands of the said administrator is not sufficient to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration; or that a sale of the whole or any portion of the real estate of said decedent is necessary for the payment of such debts.

8. That the order to show cause is irregular and insufficient.

And the said James J. Beckett, an infant, etc., sets forth the following as his objections and allegations in fact, viz :

1. That the said Abia A. Selover is not the owner or holder of any valid or lawful claim against the said estate, and that the said estate is not indebted to the said Selover in the amount in his said petition alleged, nor in any amount whatever, in manner and form as the same is in the said petition alleged.

2. That the said estate is not indebted to Gregory Yale upon a judgment in his favor against Samuel Flower, the administrator of said estate, in the District Court of the Twelfth Judicial District, for \$2,709, together with \$314 18-000 costs, as in the said petition alleged, nor in any amount whatever.

3. That the said estate is not indebted to the estate of James C. Hackett deceased, in the amount of \$2,500, as in the said petition alleged, nor in any amount whatever.

4. That the alleged claim of Henry H. Byrne in the said petition described was not a valid or lawful claim against the said estate, and the same was never duly presented to the said Flower, administrator, and not to the said Thomas W. Freelon, Esq., Probate Judge, as required by law, and by them, and each of them allowed, and the said allowance duly endorsed in writing upon the same; and the said estate never was indebted to the said Byrne in the amount of \$15,000, as in the said petition alleged, nor in any amount whatever; and the said claim of the said Byrne never was assigned to the said petitioner as the same is alleged in the said petition.

4 1-2. That the lawful expenses of the administration of the said estate do not now, nor will they amount to the sum of \$15,000, nor to any such sum.

5. That the personal estate in the hands of the said administrator, and the rents daily accruing from the real estate of the said decedent, will be amply sufficient to pay off and discharge all the just and lawful debts and liabilities of the said estate, and that a sale of the said real estate, or any portion thereof, is unnecessary; and is also inexpedient at the present time, which is a period of uncommon and disastrous depreciation in the value of real estate in the State of California, and especially in the county of San Francisco.

6. That James Beckett, the said decedent, was not at, or immediately previous to his death, a resident of the county of San Francisco, as in the said petition alleged.

7. That letters of administration never were duly issued to the said Samuel Flower; and the said Flower never was duly appointed and qualified as administrator of the said estate.

8. That the said alleged claim of Henry H. Byrne, is barred by the statute of limitations, the same not having accrued within the period of two years before the death of the said decedent.

9. That as to the several claims in the said petition and the schedules thereto annexed, set forth and alleged to be outstanding debts against the said estate, the same are not valid and lawful claims against the said estate, nor is any of them a valid or lawful claim.

10. That there is no proof publication of the said order to show cause, as in the said order directed according to law.

And the said James J. Beckett, an infant, etc., sets forth and alleges the foregoing



allegations and objections of fact, either upon his information and belief, or because as to the allegations in the said petition to which the same are responsive, he has no information sufficient to form a belief, and therefore, he denies the same and requires the said petitioner to make due proof thereof.

Wherefore, he prays that these, his said allegations and objections may be duly examined and considered by the said court, and that the order heretofore made, be vacated, and for such further order as may be proper.

E. CASSELY, for Respondent.

### NO. 111.

#### ORDER OF SALE OF PERSONAL AND REAL ESTATE AFTER CONTEST. (164, 151 to 163, 73.)

State of California, County of San Francisco, ss.

In the Matter of the Estate  
of

James Beckett, deceased. Petition of A. A. Selover, a creditor for the sale of personal and real estate of the estate of said deceased.

In the Probate Court of said County.  
Term, A. D., 1855.

Present: the Hon. T. W. Freelon, Probate Judge.

It appearing to the court upon the petition and application of Abia A. Selover, that he is one of the acknowledged creditors of the said estate of James Beckett, deceased, and that said Selover, at the September term of this court, A. D. 1855, filed his petition in writing, duly verified, showing that claims had been allowed against the said estate, and that a sale of the personal property is necessary for their payment, and also for the expenses of the administration, and that there is not sufficient personal property or estate in the hands of the administrator of said estate to pay the debts outstanding against the deceased and the expenses of administration, and alleging, that it is necessary to sell the whole, or some portion of the real estate for the payment of such debts, and that the administrator has neglected to apply for an order of sale. And upon such petition and application of said Selover, it having been at said September term, 1855, ordered by the Judge of said probate court, that all persons interested, should be and appear before him at the court room of said probate court, on Monday, the 22d day of October, A. D., 1855, at 11 o'clock, A. M., of said day, (that time having been specifically appointed for the hearing of said petition,) to show cause why an order should not be granted to the administrator of said estate, authorizing and requiring him to sell the personal property and so much of the real estate of said deceased as should be necessary to pay such debts, and that a copy of said order to show cause, should be published at least four successive weeks in the daily Placer Times and Transcript, a newspaper, printed in the city of San Francisco.

And on that day, at the time and place named in said order, to show cause, upon due proof of the publication of a copy of the said order, in pursuance of said order, and on divers other days and times to which the hearing of said matter was from time to time duly adjourned, the court having fully heard and examined the allegations and proofs of the petitioner, and also the allegations and proofs of Sarah O. Beckett, claiming as the widow of James Beckett, deceased, and James J. Beckett, claiming as infant heir of James Beckett, deceased, by C. Gallager, his guardian, *ad litem*, in opposition thereto, and the arguments of their respective counsel; and it appearing to the court upon such hearing and examination, and proofs, that claims to a large amount have been duly allowed and established against said estate to divers persons, and that a sale of property is necessary for their payment; and it further appearing to the court, that there is not sufficient personal property to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole or larger portion of the real estate for the payment of such debts; and it further appearing that the administrator of said James Beckett, deceased, has neglected to apply for an order of sale of said personal or real estate of said deceased; and it further appearing that said petitioner, Abia A. Selover, is the owner of large claims against said estate, duly established, proven, allowed and ranked among the acknowledged debts of said estate, as more particularly set forth in his said petition.

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And it further appearing upon the examination of the allegations and proofs of said A. A. Selover, of said Sarah O. Beckett and James J. Beckett, that no good reason exists why the said order of sale should not be granted as prayed for to said Samuel Flower, administrator of the estate of James Beckett, deceased.

Now, on this 28th day of December, A. D., 1855, to which day the said cause was duly adjourned.

It is therefore ordered and adjudged by the court, that said Samuel Flower, administrator of the said estate of James Beckett, deceased, be authorized, and he is hereby required to sell the following personal property of said estate, at public auction, after public notice given for at least ten days, of the time and place of sale; said sale to be made in front of the city hall, on Kearny street, in the city of San Francisco; the notice of said sale to be given by publication in the San Francisco Daily Herald, a newspaper printed and published in the said city of San Francisco.

The following is a list of the personal property hereby authorized and required to be sold, viz:

One gold watch and chain; one diamond ring; one small gold ring; one gold pencil; one gold fob chain; one porte-monnaie.

And it is further ordered and adjudged by the court that said Samuel Flower, administrator, as aforesaid, be authorized and required to sell the following real estate of said James Beckett deceased, at public auction to the highest bidder, on the following terms, to wit: one-half cash at the time of sale and the balance in six months, with interest at one per centum per month from the day of sale until maturity, and after maturity at two per centum per month until paid, or the whole in cash, at the option of the purchaser. All sums required to be paid in cash shall be paid on the day after the sale and the credit allowed shall begin to run from the day of sale; all sums on which credit shall be given shall be secured by the purchaser by note and mortgage on the land purchased and the acts of sale, and security shall be at the expense of the purchaser.

And it is further ordered, that before making such sale, the said Samuel Flower, public administrator as aforesaid, shall give an additional bond with two or more sufficient sureties, in the penal sum of fifty thousand dollars, conditioned and executed in like manner, as additional bonds are required to be when executed by ordinary administrators, on the grant of an order of real estate by the probate court.

That said administrator shall give notice of the time and place of holding such sale according to the statute in such case made and provided, and shall in all things proceed, conduct, and manage said sale as by the said statute in such case made and provided, and due return of his proceedings to the probate judge in and for said county of San Francisco, make, at the next term of this court after such sale.

The following is the real estate hereby authorized and required to be sold, being situated in the city and county of San Francisco, and State of California.

[Here follows description of the property.]

T. W. FREELON, County Judge.

San Francisco, December 28th, 1855.

#### NO. 112.

#### PETITION FOR NEW PUBLICATION OF NOTICE OF APPLICATION FOR SALE. (§ 156, 157.)

In the Matter of the Estate	}	In the Probate Court
of		of the County of San Francisco,
William D. M. Howard, Deceased.		State of California.

The petition of Agnes Howard, George H. Howard and Henry F. Teschmaker, executrix and executors of the last will and testament of the said William D. M. Howard deceased, respectfully shows to this court:

That heretofore, to wit, on the 27th day of September, 1856, your petitioner filed their petition in this honorable court, praying for an order authorizing and directing them to sell certain real estate in the said last mentioned petition particularly mentioned and set forth, for the purpose of paying the debts of the estate and the legacies of the decedent's will, as by the said petition now on file in this court will more fully and at large appear.

And your petitioners further show, that upon the filing of said petition such proceedings were had in this honorable court that an order was entered fixing the 27th day of October, 1856, for hearing said application and directing that notice be given to all persons interested in said estate to be and appear in the probate court room

in the City Hall, in the city of San Francisco, at 10 o'clock, A. M., of that day, or as soon thereafter as counsel could be heard, and then and there show cause, if any, why said application should not be granted as prayed for, and that said notice should be given by publication twice a week, up to and including the said day set forth for hearing, in the San Francisco Daily Herald, a newspaper published in said county of San Francisco.

And your petitioners further show, that in pursuance of said order the said notice was inserted in the said newspaper on the said 27th day of September and published according to the terms of said order twice a week, until the aforesaid day of hearing, but that during the said period of publication the name of said newspaper was changed from the "San Francisco Daily Herald" to the "San Francisco Herald," in consequence of which change doubts have arisen as to the regularity of said publication.

Wherefore, your petitioners pray that an order may be granted fixing a new day for the hearing of said application, and directing the publication of notice thereof pursuant to the terms of the statute in such cases made and provided.

JULIUS K. ROSS, Attorney for Petitioners.

State of California, San Francisco County: ss.

George H. Howard, one of the above petitioners, being duly sworn deposes and says, that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge and belief.

Sworn to and subscribed before me, this 6th day of November, A. D. 1856,  
L. W. SLOAT, Notary Public. } Geo. H. HOWARD,  
Executor of the last will and testa-  
ment of Wm. D. M. Howard, dec'd.

#### NO. 113.

#### ORDER FOR HEARING AND PUBLICATION. (§ 156.)

In the Matter of the last Will and Testament  
of  
William D. M. Howard, Deceased. }

On reading and filing the application of Agnes F. Howard, George Henry Howard and Henry F. Teschmacher, the executors of the last will and testament of said deceased, praying for the sale of the real estate of said deceased for the purpose of paying the outstanding debts against said estate, the expenses of administration and the legacies as prescribed in the last will and testament.

It is by the court ordered, that Monday, the 8th day of December, A. D. 1856, at 11 o'clock, A. M., of said day, be set apart for hearing said application and that said notice be given to all persons interested in said estate to be and appear in the Probate Court in the City Hall, in the city of San Francisco, on that day, or as soon thereafter as counsel can be heard, and then and there show cause, if any they have, why said application should not be granted as prayed for; and that notice of the same be given by publication twice a week up to and including the day set for hearing in the Daily Alta California, a newspaper published in said city and county.

T. W. FREELON, County Judge.

San Francisco, November 7th, 1856.

#### NO. 114.

#### ORDER OF SALE OF REAL ESTATE. (§ 162, 163.)

In the Matter of the Estate  
of  
William D. M. Howard, Deceased. } In the Probate Court,  
in and for the County of San Francisco,  
State of California.

This cause having come on to be heard on this 8th day of December, A. D. 1856; upon the petition of Agnes Howard, George H. Howard and Henry F. Teschmacher, executrix and executors of the last will and testament of William D. M. Howard, deceased, praying for an order authorizing and directing the sale of the real estate hereinafter mentioned and described, for the purpose of paying the debts of said estate and the legacies provided for in the will of said decedent; and due proof be-

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ing made of the publication of an order and notice according to law, requiring all persons interested in the said estate to appear in this court on the day last aforesaid and show cause, if any, why the prayer of the said petition should not be granted; and due proof being also made of the service of said order and notice on George H. Howard general guardian of William Henry Howard, infant son of the said decedent, the said George H. Howard being a resident of the county of San Francisco; on reading and filing said petition, and no one appearing to oppose, and it appearing to the said court on due deliberation, necessary and expedient that the sale so prayed for should be made, for the reasons and purposes particularly mentioned and set forth in the said petition, it is by the said court ordered, adjudged and decreed, that the said executrix and executors do forthwith proceed to sell at public auction, to the highest bidder for cash, the following described property belonging to the said estate, that is to say:

[Here follows description of the property.]

And it is further ordered, adjudged and decreed, that the said real estate be sold, in all cases, between the hours of ten o'clock, A. M., and four o'clock, P. M.; that the same may be sold in the subdivisions hereinbefore mentioned, or in such other subdivisions thereof as the said executrix and executors may deem expedient and most for the interest of the said estate; that the said real estate be sold at the Musical Hall, on Bush street, in the city of San Francisco, or if the said building cannot be obtained for the purpose of holding sales, that then the same be held at such other convenient and suitable place in the said city as the said executrix and executors in their discretion may select.

And it is further ordered, adjudged and decreed that the said executrix and executors before proceeding to make the sales aforesaid, give due notice of the time or times, place or places of holding said sales, by posting notices thereof in three of the most public places in the county of San Francisco, in which the said real estate is situated, and by publishing a notice thereof in some newspaper printed and published in the said county of San Francisco for three weeks successively next before such sales, in which notices the lands and tenements to be sold shall be described with common certainty.

And it is further ordered, adjudged and decreed, that the said sales be made upon the following terms of payment, to wit: one half cash, and one half on a credit of three months, or the whole for cash, at the option of the purchaser; the said cash payment to be made on the day after the day of sale, and the said credit to bear interest at the rate of one per cent per month, payable monthly, and if not paid at maturity then to bear interest until paid at the rate of three per cent. per month, and that such credits be secured by a note or bond of the respective purchasers at such sales, and a mortgage of such purchasers upon the premises by them respectively bought, and that the acts of sale and of security be in all cases at the expense of purchasers.

And it is further ordered, adjudged and decreed, that the said executrix and executors report their acts and doings hereunder, with all convenient speed to this court.

T. W. FREELON, County Judge.

Dated San Francisco, December 8th, 1856.

#### NO. 115.

#### ORDER CONFIRMING SALE, MADE UNDER SPECIAL ACT OF LEGISLATURE. (§ 169, 171.)

In the Matter of the Estate of William D. M. Howard, Deceased.	}	In the Probate Court in and for the County of San Francisco, State of California.
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On reading and filing the report of Agnes Howard, Henry F. Teschemacher and George H. Howard, executrix and executors of the last will and testament of William D. M. Howard deceased, whereby it appears that the said executrix and executors under and by virtue of the power and authority to them given in and by a certain act of Legislature of the State of California, entitled "An Act to authorize the Executrix and Executors of the last Will and Testament of William D. M. Howard, deceased, to sell Real Estate of the Testator at private sale," approved March

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28th, 1857, have sold all that certain lot, piece or parcel of land situate, lying and being in the city of San Francisco, and bounded and described as follows :

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[Here follows description of the property.]

And it appearing to the court that said sales were made in all respects in conformity with the terms and provisions of the said act, and that the prices for which the said lots were respectively sold are reasonable and not disproportionate to their value ; it is, on motion of Julius K. Rose, of counsel for said executrix and executors, ordered, adjudged and decreed, that the said sales and each and every of them be confirmed.

T. W. FREELON, County Judge.

## NO. 116.

### ORDER OF SALE OF REAL ESTATE. (162, 163.)

In the Matter of the Estate )	Probate Court.
of	
Archibald A. Ritchie, Dec. }	For the County of San Francisco.

This cause coming on to be heard this day upon the sworn petition of the administrator and administratrix of said decedent, and the allegations therein contained, (the infant and minor heirs being duly represented by Harvey S. Brown, Esq., guardian, *ad litem*.) praying for an order of this court authorizing them, the said administrator and administratrix, by reason of the insufficiency of the personal estate to pay off, satisfy and discharge the allowance to the family, the debts outstanding against the said estate and the charges and expenses of administration, to sell the real estate described in said petition for the payment and satisfaction of the liabilities above mentioned, and it appearing to the satisfaction of the court, that due publication of such application has been made in the San Francisco Herald, a newspaper, published daily in the city and county of San Francisco, and that the prayer of the said petition is right and proper, and should be granted.

It is therefore adjudged, ordered and decreed, and this court doth hereby adjudge, order and decree, that the said administrator Robert H. Waterman and the said administratrix, Martha H. Ritchie, be, and the same are hereby authorized to sell for the purposes set out in the said petition, viz: the payment and discharge of the debts and liabilities above mentioned, the real estate herein mentioned and described below, or so much thereof as will be sufficient to pay off and satisfy the debts and liabilities aforesaid, it being the same real estate mentioned and described in said petition, viz :

[Here follows description of property, etc.]

And it is hereby further ordered, that in making said sale of the above mentioned real estate, the administrator and administratrix shall sell in such order as to them shall seem most proper and beneficial to the interests of the said estate of their said decedent, and shall strictly pursue the directions of the statutes in such cases made and provided.

And it is further ordered, that the administrator and administratrix shall sell the said real estate upon the following terms, viz: *ten per cent* of the purchase money shall be paid in cash by the purchaser or purchasers on the day of sale: *one half* of the remainder shall be paid upon the confirmation of the sale by this court, and the then remaining half shall be paid at the end of six months, from and after the said day of sale. For the deferred or credit payment in each and every case, the administrator and administratrix shall take the note of the purchaser or purchasers, with a mortgage upon the property in each and every case bought by the respective purchaser to secure the payment of the note.

And it is further ordered, that at the next term of the court, after making such sale or sales, the administrator and administratrix shall return to this court a full and accurate report of their proceedings in the premises.

T. W. FREELON, County Judge.

[The bond to be given on the sale of real estate, § 73, is easily drawn from Form No. 38, *ante*.]

NO. 117.

ORDER FOR APPOINTMENT OF GUARDIAN FOR MINOR HEIRS, ON APPLI-  
CATION FOR SALE. (§ 159.)

State of California, } In the Probate Court,  
County of San Francisco. } within and for the county aforesaid.

In the matter of the last will and testament of Joseph L. Folsom, deceased.

Upon the presentation of the petition of the executors of the last will and testa-  
ment of Joseph L. Folsom, deceased, praying for an order to sell the whole or so  
much and such parts of the real estate of the testator mentioned and described in  
their petition as the probate judge shall deem necessary for the payment of the  
legacies to the mother and sister of the testator, the debts outstanding against the  
estate and the expenses of administration, it being made to appear to the court that  
the following devisees and heirs of the testator, viz: Almeda Forrest, Martha Jose-  
phine Forrest, George Frank Decatur Forrest, and Gustavus Decatur Folsom, are  
minors, under twenty-one years of age, having (none of them,) a general guardian,  
in this country or elsewhere, in this state; it is ordered that, Gwyn Page, of the  
county of San Francisco, be and is hereby appointed the guardian of the said  
infant devisees and heirs, for the sole purpose of appearing for them and taking  
care of their interests in the proceedings on the said petition, the guardian hereto-  
fore appointed by the court being now absent from the state; and it is further  
ordered, that the appointment of Edward Stanley, the former guardian to the same  
is hereby revoked from this date.

Witness my hand, this 1st September, 1856.

T. W. FREZLER, County Judge.

NO. 118.

ORDER OF CONFIRMATION OF SALE. (§ 171, 173.)

STATE OF CALIFORNIA, } In Probate Court.  
COUNTY OF SAN FRANCISCO. } February 9th, 1857.

In the Matter of the Estate }  
of }  
Joseph L. Folsom, Deceased. }

Whereas, by an order of the probate court, made on the 29th day of December, A.  
D. 1856, Henry W. Halleck, Archibald C. Peachy and P. Warren VanWinkle, the  
duly appointed and qualified executors of the last will and testament of Joseph L.  
Folsom deceased, were authorized and directed to sell at public auction, certain real  
estate and property belonging to the estate of Joseph L. Folsom, situated in the  
county of San Francisco, in said State, and particularly set forth and described in  
the said order;

And whereas, under and by virtue of the said order of sale, and pursuant to the  
terms thereof, the said executors, after due and legal notice given, exposed for sale  
and sold at public auction on the twenty-eighth day of January, A. D. 1857, in the  
city of San Francisco, to the highest bidder, the real estate situated in the county  
of San Francisco and described and set forth in said order of sale;

And whereas, at the next term of the court after such sales the said executors  
duly made to this, the said probate court, returns verified by their oath, of their pro-  
ceedings with account of the sales under the said order of sale, setting forth therein  
the particular pieces and subdivisions of land sold, the persons to whom they were  
sold, the amount for which they were sold, the payments made on account of the  
purchases, and all other matters relating to the said sales, under the said order,  
which said return was made and filed on the second day of February, A. D. 1857;

And whereas, on the said second day of February, A. D. 1857, an order was made  
by this court that all persons interested in the estate of Joseph L. Folsom deceased,  
and all persons having objections to the confirmations of the sales so reported, or  
any of them, either for that the proceedings were unfair, or that the sum bid is dis-  
proportionate to the value of the lot sold, and that a sum exceeding such bid, at least  
ten per cent. exclusive of the expense of a new sale, may be obtained, or for any  
other reason, show cause on Monday, the 9th day of February, 1857, at the court

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room of this court, or so soon thereafter as they could be heard, why an order should not be entered confirming said sales and directing conveyances to be executed, which said order to show cause was published, as appears by affidavit on file, in the San Francisco Herald, a daily newspaper of the city of San Francisco, for seven days, being from the third day of February to the ninth, both days inclusive;

And whereas, on this day it has been made to appear by proof to the satisfaction of the court, that the notice required by law was given of the said sales, and further made to appear to the court that the sale was in all respects legally made and fairly conducted, that the sum of thirteen thousand and two hundred dollars (\$13,200) bid upon the piece or subdivision as hereinafter set forth was not disproportionate to the value of the property sold, and that upon said piece or subdivision sold the purchasers have made the one half payment as required by said order of sale;

Now it is hereby ordered, that the said sale by the said executors of the following piece or subdivision of land, together with the improvements thereon, as follows:

[Here follows description of the property.]

Be and the same is hereby confirmed and made valid to the purchasers, John Wieland and August Koelscher;

And it is further ordered, that the executors make, execute and deliver to the said purchasers of the said piece or subdivision of land hereinbefore set forth, with the names of the purchasers and the amount bid, a good and valid deed, conveying the right, title, interest and estate which the said Joseph L. Folsom had therein at the time of his death, and all right, title and interest which the said executors may have acquired therein for the estate of said Folsom since his decease, but the delivery of said deed is to be upon the receipt, at the same time, of a mortgage upon the same piece or subdivision of land from the said purchasers, if they have not paid the full amount of their bid, and elect to give a mortgage for one half the purchase money, in the manner set forth in the order of sale, the said deed and mortgage to be made by the attorney of the executors at the expense of the purchasers, according to the announcement in the terms of sale.

In witness hereof I, Thomas W. Freelon, County Judge and ex-officio Probate Judge in and for the county of San Francisco, have in open court on this ninth day [SEAL.] of February, A. D. 1857, hereunto set my hand and caused the seal of the Probate Court of the said county of San Francisco to be affixed.

THOMAS W. FREELON,

County Judge and ex-officio Judge of the Probate Court.

Attest: THOMAS HAYES, Clerk.

By DENIS LYONS, Deputy Clerk.

## NO. 119.

### DEED OF EXECUTOR OR ADMINISTRATOR. (§ 172.)

This Indenture, made the       day of June, Anno Domini, eighteen hundred and fifty eight, at the city and county of San Francisco, state of California, by and between A. B. and C. D., the duly appointed and qualified executors [or administrators] of G. H., deceased, late of said city and county of San Francisco, parties of the first part, and E. F., of the city and county of San Francisco and same state, party of the second part, witnesseth, that whereas, on the       day of March, A. D., 1858, the probate court within and for the city and county of San Francisco, made an order of that date, authorizing and directing the said parties of the first part to sell certain real estate of the said G. H., deceased, situated in the said city and county, and particularly set forth and described in said order of sale, either as the same was therein described, or in such subdivisions and parcels as, in their judgment, would secure the largest price; a certified copy of which order of sale is on record in the office of the County Recorder of the city and county of San Francisco, in book of       page       and following, and is hereby referred to and made part of this indenture:

And whereas, under and by virtue of said order of sale, and pursuant to legal notices given thereof, the said parties of the first part, on the       day of May, A. D., 1858, at the auction rooms of S. L. Jones & Co., in said city and county, between the hours of 10 o'clock, A. M., and the setting of the sun on that day, offered for sale to the highest bidder, the real estate situated in the said city and county, and described in said order of sale, and at such sale the said party of the second

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part became the purchaser, for the sum of one thousand dollars, being the highest bid offered therefor, of the parcel or subdivision of land hereinafter particularly described:

And whereas, the said probate court, upon the return of said sale, made at the next term thereof by the said parties of the first part, did on the 17th day of May, A. D., 1858, make an order confirming said sale and directing conveyances to be made therefor, and directing a conveyance to be executed therefor; a certified copy of which order, confirming said sales and directing such conveyances is recorded in the office of the County Recorder of the said city and county, in book " of deeds," page and following, and is hereby referred to and made part hereof:

Now, therefore, the said A. B. and C. D., executors [or administrators] as aforesaid, parties of the first part, pursuant to the order of the said probate court, for and in consideration of the sum of five hundred dollars, to them in hand paid, and five hundred dollars secured to be paid by the said E. F., party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, interest and estate of the said G. H., at the time of his death, and also all right, title and interest acquired by the said parties of the first part for the estate of said E. F., since his decease, in and to that certain piece or parcel of land situated in said city and county of San Francisco, described as follows, (reference being had to the official map of said city and county, on file in the office of the Recorder aforesaid) to wit: [Description,] together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or appertaining. To have and to hold, all ands in-gular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns, to his sole use, benefit and behoof forever.

In witness whereof, the parties of the first part, executors [or administrators,] as aforesaid, have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered in presence of }

A. B., [SEAL]  
Executor [or administrator] of the estate of G. H., deceased.

C. D., [SEAL]  
Executor [or administrator] of the estate of G. H., deceased.

State of California, City and County of San Francisco, ss.

Be it known, that on this day of June, A. D., 1858, personally appeared before me, a Notary Public, within and for the county aforesaid, A. B., and C. D., personally known to me to be the persons described in and who executed the foregoing deed, as executors [or administrators] of the estate of G. H., deceased, and severally acknowledged to me that they, as executors [or administrators] of the estate of G. H., deceased, executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, the day and year above written.

J. K., Notary Public.

## NO. 120.

### BOND OF INDEMNITY TO ADMINISTRATORS. (§ 183, 184.)

Know all men by these presents, that we, Obadiah B. Dickinson, as principal, and Benjamin Brewster and John C. Horan, as sureties, are held and firmly bound unto David S. Turner, administrator of the estate of John Smith, deceased, for the benefit and indemnity of said administrator, and the benefit and indemnity of the persons entitled to the interest of said deceased in the lands contracted for as hereinafter mentioned, in the sum of ten thousand dollars, for the payment of which sum to the said D. S. Turner, administrator, and the said persons so entitled as aforesaid, or to each, or any of them, and to their or any of their executors, administrators and assigns, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, and firmly, by these presents, sealed with our seals, and dated this, &c.

The condition of the above obligation is such, that whereas, under, and by virtue of an order of the probate court in and for the city and county of San Francis-



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co, duly made and entered on the first day of, etc., a sale made by said administrator of the interest of said deceased, in and to certain lands, lying and being in the county of, &c., known as the rancho "*Quien Sabe*," said interest being a certain contract heretofore to wit, on etc., made by the said deceased in his life-time, on the one part, with one Francisco Lugo, the then owner of said lands on the other part, for the purchase by said John Smith of the said rancho, for the sum of six thousand dollars, and upon which, said purchase, in accordance with the terms of said contract, said John Smith has paid the sum of one thousand dollars and the sum of five thousand dollars in several payments is to become due; and whereas, upon the said sale, the said O. B. Dickinson became the purchaser of said contract, and bought the interest of said deceased therein for the sum of one thousand dollars, and the said sale has been duly reported to the said court according to law, an application is about to be made to the said court to approve and confirm the same, and an assignment of the said contract to the said O. B. Dickinson, of even date herewith, has been executed, to be delivered upon the execution and delivery of these presents, and upon such confirmation being made as aforesaid.

Now, therefore, if the said purchaser, the said O. B. Dickinson, shall well and truly pay, satisfy and discharge all the payments to become due upon the said contract, after the date of such sale, and shall fully indemnify, save and hold harmless, the said D. S. Turner, administrator, and the person or persons so entitled as above set forth, and such of them, against all demands, costs, charges and expenses by reason of any covenant or agreement contained in such contract, then this obligation to be void, else to remain of full force and virtue.

O. B. DICKINSON, [SEAL.]  
BENJ. BREWSTER, [SEAL]  
J. C. HOBAN, [SEAL.]

Sealed and delivered in presence of  
PERRY G. CHILDS.

## NO. 121.

### PETITION THAT PARTNER OF DECEASED RENDER AN ACCOUNT. (§198.)

In the Matter of the Estate }  
of }  
B. C. Deceased. }

To the Hon. the Probate Judge of the City and County of San Francisco :

The petition of F. G., administrator, respectfully sheweth, that the inventory of the property of said deceased was duly returned and filed herein, showing a partnership interest of said deceased in the late firm of Jones & Co., which firm consisted of said deceased, and one William A. Jones, and which said interest is appraised at the sum and value of ten thousand dollars.

That more than six months have elapsed since said inventory was filed, and that said William A. Jones, the surviving partner of said deceased, has not rendered any account to your petitioner as such administrator, and refuses to give any information as to the condition of the affairs of said partnership; that debts to a large amount have been presented against said estate, and it becomes necessary to ascertain the amount of said partnership interest, in order to determine the necessity of selling real estate to pay said debts and the expenses of administration.

Wherefore, your petitioner prays, that said William A. Jones be ordered to render an account of the said partnership, showing a full statement of its affairs at the time of the death of said deceased, and the condition thereof from that time until the day of rendering said account.

F. G., Administrator.

Dated, etc.  
[Sworn to as in form No. 35.]

## NO. 122.

### ORDER FOR CITATION ON THE FOREGOING. (§198.)

[Title of estate and court.]

On reading and filing the petition of F. G. the administrator herein, praying for au

order to compel W. A. Jones, as surviving partner of deceased, to render an account of the partnership affairs :

It is hereby ordered that a citation issue requiring the said W. A. Jones to render an account of the partnership affairs of the late house of W. A. Jones & Co., and file the same in this court within ten days from this date. to wit : on or before the day of , 1858, or that he show cause on that day, at 11 o'clock, A. M., before the judge of this court, at the court room thereof, at the City Hall, in the city and county of San Francisco, why such account should not be rendered.

[Dated, etc.]

M. N., Probate Judge.

NO. 123.

ORDER TO SHOW CAUSE AGAINST ATTACHMENT. (§ 198.)

[Title of estate and court.]

An order having been made herein on the application of the administrator that William A. Jones, the surviving partner of deceased, be cited to render an account or show cause on this day, why an account of the partnership affairs should not be rendered ; And now, on this day of May, 1858. the said matter coming on to be heard, and due proof being made to the satisfaction of this court, that said citation was issued and, with a certified copy of the petition and order upon which the same was founded, was served personally upon the said William A. Jones, and returned to this court and filed herein at least five days before the return day thereof, and the said William A. Jones failing to appear and show cause why said account should not be rendered and filed, and it appearing by the affidavit of said administrator and from the records and files of this court, that no such account has been rendered or filed ;

On motion of said administrator it is ordered that said William A. Jones shows cause before me, at the court room of this court. at, etc., on, etc., why an attachment should not issue against the said William A. Jones, to compel him to render an account, to wit : the account heretofore ordered by this court.

[Dated, etc.]

M. N., Probate Judge.

NO. 124.

ORDER THAT PARTNERS OF DECEASED HAVE POSSESSION OF PARTNERSHIP EFFECTS. (§ 198.)

State of California, City and County of San Francisco, ss.

In the Matter of the last Will and Testament	} In Probate Court, March 19th, 1857.
of	
Adolph Gronfeir, Junior, Deceased.	} January Term, 1857. Present : Hon. Thos. W. Freelon, County Judge.

On the petition and application of Abel Guy, executor of the last will and testament of said deceased, praying that an order of said court may be made to authorize him, the said executor, to remit the sum of thirty thousand dollars to Albert de Ruymiro and Auguste de Naurais, the surviving partners of said Adolph Gronfeir, Junior, deceased, said sum being a portion of the partnership assets of said firm.

The application aforesaid having been referred to Denis Lyons, on the 16th day of March, A. D. , 1857, by an order of this court of that date to inquire into and report to this court whether consistently with the affairs and condition of said estate, said executor, Abel Guy, may remit to the said co-partners aforementioned, being now beyond the jurisdiction of this court, an amount of money now in his possession, a portion of the assets of said estate, and the joint property of said partners, and the said Lyons having filed his report herein, from which it appears that there may be safely handed over to said surviving partners the sum of \$30,000 in cash, in said executors hands, and it being proved to the satisfaction of the court, on the application heretofore made, that said company partnership was formed and entered into as alleged in the petition of the petitioner, then filed, and as such co-partners, under the provisions of the articles of copartnership were entitled to the liquidation of its affairs.

It is therefore ordered, that said executor, Abel Guy, do hand over and pay to

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Auguste de Naurais and Albert de Ruymiroi, the sum of \$30,000, and his proper charges in the premises, and to demand proper and usual evidence and vouchers for said payment.

T. W. FREELON, County Judge.

March 19th, 1857.

## NO. 125.

### PETITION TO COMPROMISE A DEBT. (§ 201.)

To the Hon. Thomas W. Freelon, County Judge, and *ex-officio* Probate Judge in and for the city and county of San Francisco :

The petition of A. B., executor of the last will and testament of C. D., late of San Francisco, deceased, respectfully sheweth unto your Honor,

That among the property of the estate of said deceased, which came to the knowledge and possession of your petitioner as such executor, was a note against E. F., dated, etc., for the sum of \$900 with interest at the rate of two per centum per month, that to secure the payment of said note and interest the said E. F. executed to said C. D. a mortgage bearing even date with said note on the following described lot of land, viz :

[Here follows description of property.]

That the whole amount now due on said note so secured, or pretended to be secured, is, to the 20th day of the present month of February, 1858, principal and interest, one thousand one hundred and seventy dollars ;

That the said E. F. alleges that he is wholly unable to pay said amount, but is willing to convey the lot of land so mortgaged to petitioner for the benefit of the estate of said testator ; that said lot is of but little value, and that were proceedings instituted in a court of law to foreclose said mortgage scarcely anything would be left after paying expenses of foreclosure, sale, etc.

Wherefore, your petitioner prays that he may be authorized to compromise said note, by taking a conveyance of the land mortgaged to secure the payment of the same, he being informed that no judgments exist against said E. F., or other incumbrances (except said mortgage) which would affect the title proposed to be given, and that thereby the most could be realized for said estate.

And your petitioner will ever pray, etc.

A. B., Executor, etc.

San Francisco, February 26th, 1858.

## NO. 126.

### ORDER AUTHORISING EXECUTOR TO COMPROMISE CLAIM. (§ 201.)

In the Matter of the last Will and Testament  
of  
C. D., deceased.

In Probate Court  
City and County of San Francisco.

On hearing the petition of A. B., executor of the last will and testament of C. D., deceased, praying for an order of this court authorizing him to compromise a certain note due said estate made by E. F. for the sum of nine hundred dollars, with interest thereon due, after a full examination of the petition and the facts and circumstances connected therewith.

It is by the court ordered, that the petitioner, executor as aforesaid, be and he is hereby authorized to take from the said E. F. in full discharge of said note of \$900 and the interest due thereon, a conveyance of the lot of land described in his petition by said E. F., mortgaged to secure the payment of said note and interest, and release and discharge said mortgage.

San Francisco, March 1st, 1858.

T. W. FREELON, County Judge.

NO. 127.

PETITION TO COMPROMISE DEBT. (§ 201.)

To the Honorable T. W. Freelon, Judge of the County of San Francisco and *ex officio* Probate Judge.

The undersigned, H. W. Halleck and P. Warren Van Winkle, executors of the estate of Joseph L. Folsom, deceased, by their attorney, Frederick Billings, Esq., respectfully represent, that at a sale of your petitioners of a part of the real estate of said estate, on the 11th of January, 1856, under the order of this court, dated December 17th, 1855, A. B. became the purchaser of a lot, commencing, etc., for the sum of \$7,850, upon which sum he has only paid \$500. That said sale was reported to this court, on the 21st of January, 1856, and confirmed by order of this court on the 5th of February, 1856.

That the said A. B. is insolvent, and unable to pay any more of said sum; that he is willing to restore the said lot to the petitioners and lose the payment made, and the petitioners are willing to accept the property and said sum, and release him from all responsibility for the balance.

That no deed has been made to him for said lot, and the title is still in your petitioners as executors.

Your petitioners therefore pray, that the orders of confirmation as respects the said A. B., be set aside, and the executors be at liberty to sell the said lot again at public sale, to the highest bidder, on such terms as they may deem most beneficial to the estate.

FRED. BILLINGS,  
Attorney for Executors.

June 15, 1857.

NO. 128.

ORDER FOR SAME. (§ 201.)

In the Matter of the application of the Executors of Folsom, to set aside the order confirming a sale of real estate to A. B. }

Upon reading and filing the petition of H. W. Halleck, A. C. Peachy, and P. Warren Van Winkle, executors of Joseph L. Folsom, deceased, and on motion of Frederick Billings, Esq., attorney for said executors, and it appearing to the satisfaction of the court that the facts set forth in said petition are true, and upon the appearance of D. O. Shattuck, Esq., counsel for the said A. B., and admitting the facts as set forth in said petition and assenting to the prayer thereof,

It is hereby ordered, adjudged and decreed, that the sale of the said lot to wit: to the said A. B., on the 11th of January, 1856, and the confirmation of said sale by order of this court, on the 5th day of February, 1856, be and the same are hereby set aside and annulled, no conveyance of said lot having been made to him by said executors, and it appearing to the court that the said A. B. is insolvent, and unable to pay to the said executors the balance of said sum due on said lot; it is further ordered, that the said \$500 received by the said executors as part payment on said sum and the said lot be accepted by the executors as a compromise for any balance due on said sale from him, and that the said executors be authorized, and they are hereby authorized to sell said lot at public sale to the highest bidder on such terms as they may deem most beneficial to the interests of the estate.

T. W. FREELON, County Judge.

June 15th, 1857.

129.

APPLICATION OF CREDITORS FOR EXECUTOR TO BRING ACTION TO RECOVER PROPERTY FRAUDULENTLY CONVEYED BY DECEASED. (§ 203, 202.)

[Title of Estate and Court.]

To the Hon. the Probate Judge, etc.

The application of A. B., C. D., E. F. and G. H., respectfully sheweth, that they are creditors of said deceased to the aggregate amount of \$8,000, and their several

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claims are on file, duly allowed and approved. That as appears by the inventory on file herein, and the showing made by the executor of deceased by his account rendered to this court on (date,) there is a deficiency of assets in the hands of said executor sufficient to pay the claims of your petitioners; that said deceased, in his lifetime, was possessed of certain real estate, described as follows: (description,) and also certain goods, chattels, rights and credits, a schedule of which is hereto annexed, which he conveyed to one M. N., on (date,) and which conveyance these petitioners are informed and believe, and therefore they so allege and charge, was made fraudulently and with intent to defraud his creditors, and which said estate and property, if now in the possession of said executor, as assets of this estate would be more than sufficient to pay the said claims of your petitioners.

That your petitioners have made application to said executor, to prosecute an action for the recovery of said property on behalf of said estate which he has wholly neglected and refused to do.

Wherefore, your petitioners pray that a citation may be issued, requiring said executor to show cause why he should not proceed to recover said property by suit at law or in equity, on payment of such part of the expenses of such proceeding, or upon giving such security therefor to the said executor, as this Hon. Court may direct.

[SIGNED BY PETITIONERS.]

[Sworn to as in No. 85.]

## NO. 130.

### ORDER FOR SAME. (§ 203, 202.)

[Title of estate and court.]

A. B., C. D., E. F. and G. H. having made due application to this court by their petition filed therein on (date) and the executor of this estate having been duly cited to show cause, and the matter now coming on to be heard, and the said petitioners appearing by Mr. Bowman, their counsel, and said executor in person, and a full showing having been made, and it appearing to this court that there is sufficient ground of fraud in the said conveyance of said property to justify the institution of an action for the recovery of the same, It is hereby ordered that said executor proceed forthwith and without unnecessary delay to commence and that he prosecute to final judgment a proper action for the recovery of said property, upon the payment by said petitioners to him of the sum of \$500, as a deposit for the costs and expenses of such proceeding, and a sufficient bond of indemnity to be approved by this court in the sum of \$1,000, as security for any further costs and expenses which may therein and thereby be incurred by said executor.

M. N., Probate Judge.

## NO. 131.

### PETITION FOR CONVEYANCE OF REAL ESTATE. (§ 206)

[Title of estate and court.]

To the Hon. the Probate Judge, etc.

The petition of, etc., sheweth, that on the      day of      , 1866, a contract in writing was made and entered into between A. B., then resident of the city of San Francisco and your petitioner, wherein and whereby it was agreed that whereas said A. B. was the owner of a certain lot of land lying and being in said city of San Francisco, to wit: (Description.) Your petitioner should erect, or cause to be erected, upon said lot certain brick buildings, and that in consideration thereof, after the construction and full completion of said buildings, said A. B. should convey to your petitioner the eastern half of said lot, all of which appears more fully by reference to said contract, which is annexed hereto and made part of this petition; § 206.

That thereupon your petitioner proceeded to erect and construct said buildings upon said lot and performed his part of said contract within the time and according to the terms therein set forth.

That shortly after buildings were completed said A. B. died, without making any such conveyance to your petitioner as required by said contract, and that letters of

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administration upon his estate were issued by this honorable court to M. N., who is now the administrator of the estate of said A. B.;

Wherefore your petitioner prays that a decree may be made directing the said M. N., administrator, to make and execute to this petitioner a conveyance of said eastern half of said lot, after a due hearing for that purpose be had before this court at a time to be appointed by this court, and of which notice be given by publication according to law to all persons interested to appear and show cause therein.

[Sworn to as in No. 85.]

C. D., Petitioner.

NO. 132.

DECREE ON THE ABOVE. (§ 208.)

In the Matter of, etc. In Probate Court, etc.

- Application having been made herein by C. D., by petition duly verified and filed, showing, etc., [recite substance] and the hearing of said matter having been appointed for this day at 11 o'clock, A. M., the same being a regular term of court, and due notice thereof having been given in accordance with the order of this court, by publishing the same in the, etc., for four successive weeks, to wit: from
- § 206. to , as is proved by the affidavit of W. Y., duly filed herein, and the same coming on to be heard, counsel appearing in behalf of petitioner and of said administrator, and no other person interested in said estate appearing, and said matter being fully examined, argued and considered, and thereupon, after due deliberation, it appearing to this court that said contract is legal, equitable and just, and that the same has been fully performed on the part of said C. D., and that said C. D. is fully and clearly entitled to a conveyance of one half of said lot according to the terms of said petition;
- § 205. It is hereby ordered, adjudged and decreed, that said M. N., administrator of the
- § 208. estate of A. B. deceased, do make, execute and deliver to said C. D., petitioner, a conveyance of bargain and sale of one half of said lot of land, the description of which said lot of land to be so conveyed is as follows:

[Here follows description of the property.]

- And that thereupon said administrator and said petitioner execute mutual acquittances and discharges of all rights, claims and demands under and by virtue of said contract, and that the same be thereupon cancelled. It is further ordered that the expenses of this proceeding be divided equally between said estate of A. B., deceased, and said petitioner, and that a certified copy of this decree be recorded in the office of the Recorder, etc.
- § 209.
- § 212.

R. S., Probate Judge.

[Dated, etc.]

NO. 133.

ORDER OF PUBLICATION ON APPLICATION FOR CONVEYANCE. (§ 206.)

State of California, City and County of San Francisco.

In the Matter of the Estate }  
of } In Probate Court.  
James Caleb Smith, Dec'd. }

Austin E. Smith, executor of the last will and testament of James Caleb Smith, deceased, having filed his petition, which is on file in this court, setting forth in substance that a deed absolute was made and executed by one William McDaniel, of certain real estate, set forth and described in his said petition to the said deceased and one Geo. T. Marye, and alleging in his said petition that the said conveyance was intended as a mortgage only, and praying that he, the said executor, be allowed by the said court to make re-conveyance of the said property to the said McDaniel, upon the payment to and receipt by the said executor of the amount due by the said McDaniel to the said estate. Now, therefore, it is by the court ordered, that all persons interested, show cause, on Monday, May 8d, 1858, at the hour of 11 o'clock, A. M., at the court room of said court, in the city of San Francisco, why the prayer of the petitioner be not granted, and he be by order of this court allowed

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to make re-conveyance of said property, and notice of this order be published in the "San Francisco Herald," a newspaper, published in the city and county of San Francisco, twice a week, for four successive weeks.

T. W. FREELON, County Judge.

March 29th, 1858.

## NO. 184.

### NOTICE OF HEARING AND PROOF OF PUBLICATION. (206, 207.)

PROBATE COURT, city and county of San Francisco, State of California.—In the matter of the estate of J. Caleb Smith, deceased.—Pursuant to an order of this court, made this day, notice is hereby given, that Monday, the third day of May, A. D., 1858, at eleven o'clock, A. M., of said day, at the court room of this court, at the city hall, in the city and county of San Francisco, has been appointed for hearing the application of Austin E. Smith, executor of said estate, praying for an order that he make conveyance of a certain tract of land, lying and being in the county of Solano, state of California, to William McDaniel, upon the payment, by said William McDaniel, of the amount of money due by him to said estate, and which land is claimed to be held by said Estate as a security for the payment of said money, at which time and place all persons interested therein may appear and contest the same.

San Francisco, March 29, 1858.

WILLIAM DUER, Clerk.

State of California, City and County of San Francisco, ss.

Robert White, of the city of San Francisco, being duly sworn, deposes and says, that he is the book-keeper, in the office of the printer and publisher of the San Francisco Herald, a daily and weekly newspaper, published daily in the city of San Francisco, in the county aforesaid, that a notice, of which the annexed is a printed copy, has been regularly published in the said paper at least twice a week for four weeks, commencing on the third day of April, 1858, and ending on the third day of May, 1858.

ROBERT WHITE.

Subscribed and sworn before me, this 3d day of May, 1858.

WM. L. HIGGINS, Notary Public.

## NO. 185.

### ORDER TO MAKE CONVEYANCE. (§ 208.)

In the Matter of the Estate }  
of } In Probate Court.  
J. Caleb Smith, Deceased. }

State of California, City and County of San Francisco.

Whereas, on the 29th day of March, A. D., 1858, Austin E. Smith, as executor of the estate of J. Caleb Smith, deceased, filed his petition in this court, setting forth among other things, that one William McDaniel had, by his deed absolute, conveyed and transferred to the said J. Caleb Smith, in his life-time, and to one George T. Marye, certain property, to wit: all that certain piece or parcel of land, lying and being in the county of Solano, state of California, and commencing at a point, etc.; which said conveyance was so made as security for certain moneys loaned and advanced by the said J. Caleb Smith, and George T. Marye to the said McDaniel; and whereas, the said Austin E. Smith, did also in his said petition set forth, that the said William McDaniel was ready to pay over to him, the said Austin E. Smith, as executor as aforesaid, the amount of money loaned to the said William McDaniel by the said J. Caleb Smith, upon the execution of a re-conveyance by the said Austin E. Smith, as executor, of the aforesaid real estate or property; and whereas, it appearing to this court that due public notice was given, as required by an order of this court, in the "San Francisco Herald," a newspaper published in the city and county of San Francisco, of the application so made by the said Austin E. Smith, in his said petition to make re-conveyance to the said William McDaniel of the afore-

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said property, upon the payment by the said McDaniel to the said Austin E. Smith, as executor, as aforesaid, of the money so loaned by the said J. Caleb Smith to the said McDaniel; and whereas, by an order of this court, made and entered on the third day of May, A. D., 1868, a reference was made to D. P. Belknap, to inquire into, ascertain and report to this court the amount of money so due the estate of J. Caleb Smith, deceased; and whereas, on the 10th day of May, 1868, the said Belknap having taken the necessary proofs of the matter so referred to him, did report to this court, that there is due to the estate of J. Caleb Smith, deceased, by the said William McDaniel, the sum of three thousand seven hundred and twenty-two dollars and fifty cents, (\$3,722 50) which report is on file in this court; and whereas, on motion made in open court in behalf of said executor, on the 10th day of May, 1868, the report of said referee was duly confirmed; and it appearing to the court, that a re-conveyance of the said property should be made as prayed for by said executor. Now, therefore, it is by the court ordered, adjudged and decreed, that Austin E. Smith, as executor of J. Caleb Smith, deceased, by deed of release and quit claim, duly executed and acknowledged by him as such executor, re-convey to the said William McDaniel, all the right, title and interest held and enjoyed by the said J. Caleb Smith, in his life-time in and to the aforesaid piece or parcel of land, upon the payment to the said Austin E. Smith, as such executor by the said William McDaniel of the aforesaid sum of three thousand seven hundred and twenty-two dollars and fifty cents, with all interest accumulating thereon from the date of this order at the rate of two per cent per month.

M. C. BLAKE,  
County Judge and *ex-officio* Probate Judge.

May 10th, 1868.

NO. 136.

ANOTHER FORM OF SAME. (§ 208.)

STATE OF CALIFORNIA, }  
COUNTY OF SAN FRANCISCO. } In Probate Court.

In the Matter of the Petition of the Board of Education  
of the City and County of San Francisco for a decree  
authorizing and directing the Executors of Joseph L.  
Folsom deceased, to make a conveyance of Real Es-  
tate. }

Whereas a petition was duly presented to this court on the 12th day of October, 1867, by the Board of Education of the city and county of San Francisco, claiming to be entitled to a conveyance of certain real estate therein described, from the executors of Joseph L. Folsom deceased, upon the facts set forth in said petition: And whereas this court appointed the 16th day of November, 1867, at the regular term of the probate court, held on that day at the probate court room in said city and county, as the time and place for hearing said petition, and did order notice of the pendency thereof, and of the time and place of hearing, to be published at least four successive weeks before said hearing, in the Daily California Chronicle, a newspaper published in the State, city and county aforesaid.

Now on this 16th day of November, 1867, it appearing upon proof by the affidavit of H. F. W. Hoffman that due publication of said notice has been made, and the executors of said Folsom estate appearing by their attorney, F. Billings, Esq., and admitting the facts set forth in said petition by their answer in writing to said petition filed in this court, the court proceeded to hear the parties, and after a full hearing upon such petition and examination of the facts and circumstances of the claim, the probate judge being satisfied that the petitioners are entitled to a conveyance of the real estate described in their petition, on motion of F. P. Tracy, attorney for said petitioner, it is ordered and decreed that said executors are hereby authorized and directed to execute a conveyance of said real estate, being the fifty-vara lot numbered on the official map of said city of San Francisco No. 418, to said petitioners.

Let the executors pay the expenses of this proceeding, taxed at \$29 40.

T. W. FREELON, County Judge.



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NO. 187.

## PETITION FOR ORDER TO MAKE CONVEYANCE. (§ 208.)

In the Probate Court of the }  
County of San Francisco. }

To the Honorable John D. Creigh, Judge of said Probate Court:

The petitioner, Donald Davidson, represents, that heretofore, to wit, on or about the 15th of August, 1853, he entered into a contract with Eben. Knight to purchase from the said Knight the one undivided third part of the following described tract of land, to wit:

[Here follows description of property, etc.]

That on said day a memorandum of said contract was made in writing and signed by the petitioner and the said Knight, a copy of which writing marked "Exhibit A," is hereto annexed and made part of this petition, and the original will be produced and shown to the court.

That the undivided share of Mr. Mayer referred to in said writing was the one undivided third part of the tract of land above described, which Jacob R. Mayer had previously sold and conveyed, or contracted to convey to the said Knight.

That the petitioner complied with the said contract on his part by the payment to the said Knight of the sum of four thousand dollars in cash and by delivering to him a promissory note for two thousand dollars, according to the conditions of said contract; and the said Knight complied with the same upon his part by putting the petitioner in possession of the land and other property mentioned therein, but delayed executing any conveyance of the land, intending and promising, from time to time, to do so.

That the petitioner has ever since continued and is, in possession of said land and other property.

That the said Knight never did execute nor deliver any conveyance of the said land to the petitioner as he was bound, and if living might be compelled, to do.

That in the month of , 1853, the said Knight died intestate, and letters of administration on his estate have been granted by your honorable court to Carlisle P. Patterson, who has duly qualified and is now acting as administrator.

Wherefore the petitioner prays that the said administrator be cited to appear and answer this petition; that after due notice given according to law, a decree may be made authorizing and directing the said administrator to execute and deliver to the petitioner a good and sufficient conveyance of the said undivided third part of the said described tract of land, and that the costs of this application be ordered to be paid by the said administrator out of the estate of the said intestate.

CRITTENDEN & PAGE,

Attorney for D. Davidson.

March 7, 1854.

[COPY.]

EXHIBIT A.

San Francisco, 15th August, 1853.

Messrs. E. Knight and J. R. Mayer:

Dear Sirs—As arranged with Capt. Knight on Saturday last, I have agreed to purchase Mr. Mayer's one undivided share or interest in your and Capt. Isham's ranch at Santa Rosa, including land, work horses, mules, hogs, cattle and other live stock, reaper and threshing machine, farming implements and everything else belonging to it, whether on the property or elsewhere, for six thousand dollars (\$6,000), to be paid in the following manner, viz: four thousand dollars cash and a promissory note for \$2,000 at six months date, bearing interest at the rate of two per cent. per month, on your putting me in possession of the property and handing me the necessary and proper title deeds for the same. You are to pay all outlay for wages, etc., on account of the ranch up to the 31st inst.

[Signed.] D. DAVIDSON.

The above is, as I understood Mr. Mayer, and so stated to Mr. Davidson. If I am correct as above, I agree to it.

[Signed.] E. KNIGHT.

I agree to the above. [Signed.] J. R. MAYER.

San Francisco, August 25th, 1853.

Received the within four thousand dollars cash and promissory note for two thousand, as there stated, and shall put in possession, etc., as agreed to, etc.

[Signed.] E. KNIGHT.

[Previous to above agreement, Mr. Mayer sold his one-third share in the ranch to Capt. Knight.]

NO. 138.

DECREE FOR SUCH CONVEYANCE. (§ 208.)

Estate of E. Knight, deceased.  
In the matter of the petition of  
Donald Davidson for a convey-  
ance of land.

In Probate Court,  
County of San Francisco.

The petition of Donald Davidson, praying that Carlisle P. Patterson, administrator of the estate of E. Knight, deceased, be authorized and directed to convey to him the one undivided third part of a tract of land therein described, coming on to be heard this day, in pursuance of the adjournment of the same by the order of the court made on Monday, the 10th of March inst.; and proof by affidavit having been made to the satisfaction of the court of due publication of the notice of the pendency of this application and of the time and place of hearing, as required by the order of the court; and the said administrator having appeared and filed his answer to the petition, and no other objections having been filed; and the court having considered the said petition, and the answer of the administrator, and having examined the facts and circumstances of the claim, and being satisfied that the petitioner is entitled to a conveyance of the real estate described in his petition as the same is prayed.

It is ordered and decreed that, upon payment by the said Davidson of his promissory note to the said E. Knight, deceased, for two thousand dollars, part of the purchase money, and of all interest accrued thereon, the said Carlisle P. Patterson, administrator of the estate of said Knight, deceased, is authorized and required to execute, acknowledge and deliver to the petitioner, Donald Davidson, a good and sufficient conveyance by deed of quit claim, of one undivided third part of the following described tract or parcel of land, situated in the county of Sonoma, in the State of California, to wit:

[Here follows description of the property.]

Together with all the right, title and interest in and to the said undivided third part which the said E. Knight, deceased, had, or might claim on the 15th day of August, A. D., 1853, or acquired thereafter.

And it is further ordered, that all costs of this application and of the making and acknowledging of said deed, be paid by the said administrator out of the funds of the estate in his hands.

T. W. FREELON, County Judge.

April 17th, 1854.

NO. 139.

RESIGNATION OF EXECUTOR. (§ 100.)

In the Matter of the Estate }  
of }  
Francisco Blanco, Deceased. }

In Probate Court,  
of the County of Santa Clara,  
State of California.

To the Hon. John H. Moore, Judge of the Probate Court of the county of Santa Clara.

I, James Stokes, at present one of the executors of the last will and testament of Francisco Blanco, deceased, duly appointed and qualified as such, under the order of this court on the tenth day of December, A. D., 1855, do hereby resign my said appointment as such executor, and pray to be duly discharged upon the settlement of my account, which is herewith filed.

Dated, San Jose, June 3d, 1858.

JAMES STOKES.

NO. 140.

RENUNCIATION BY EXECUTOR OF COMPENSATION PROVIDED FOR IN  
THE WILL. (§ 219.)

In the Matter of, etc. Probate Court, etc.

Whereas, by the last will and testament of A. B, deceased, duly proved and admitted to probate in this county, I, Moses Schallenger, was appointed executor,

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and provision in and by said will is made for compensation for my services as such executor, and whereas, I have elected to receive for such compensation the fees and commissions allowed by law. Now, therefore, these presents are to witness that I have renounced and do hereby renounce all claim for compensation provided by said will as aforesaid, and do forever discharge, relinquish and acquit the same to said estate in consideration of the fees and compensation allowed by law.

Witness my hand and seal this 12th day of October, A. D. 1857.

MOSES SCHALLENBERGER, [SEAL.]

Sealed and delivered in presence of  
WILLIAM LOEWY.

## NO. 141.

### EXHIBIT TO BE MADE AT THIRD TERM. (§ 222.)

In the Matter of etc. Probate Court, etc.

In accordance with the provision of the statute requiring the administrator of an estate at the third term after his appointment, to render for the information of the court an exhibit under oath, showing § 222.

1st. The amount of money received and expended.

2d. The amount of all claims presented against the estate, and the name of the claimant.

3d. All other matters necessary to show the condition of its affairs.

I, William Mathews, administrator of the estate of, &c., do hereby, at this, the third term after my appointment by this court as such administrator, make and render this my account and exhibit of said estate.

1. Moneys received, as follows:

From the sale of personal property,	-	-	-	-	-	\$1,000 00
" " rents of real estate,	-	-	-	-	-	500 00
" interest moneys,	-	-	-	-	-	700 00

2. Claims against the estate:

Funeral expenses, N. Gray,	-	-	-	-	-	200 00	§ 289.
Physician's bill, expenses of the last sickness, Dr. C. G. Bryant,	-	-	-	-	-	250 00	
Note of hand, J. Lawrence Pool, approved,	-	-	-	-	-	10,000 00	§ 147.
Mortgage, H. P. Janes, approved,	-	-	-	-	-	5,000 00	
Taxes for 1857-8,	-	-	-	-	-	379 35	
Other small debts, less than \$20 each,	-	-	-	-	-	73 65	

3. The affairs of said estate:

The debts of said estate amounting to nearly \$16,000, and the moneyed assets to \$2,200, a deficiency of some \$14,000 remains, which renders necessary a sale of some real estate, an application for which purpose is about being made to this court. § 164.

WILLIAM MATTHEWS, Administrator.

State of California, County of Santa Clara, ss.

William Matthews, administrator of the above named estate, being duly sworn, says that the foregoing exhibit and statement rendered by him are true in substance and in fact.

Sworn to before me, this 10th day of May, 1857.

WILLIAM MATTHEWS.

AUSTIN L. THOMPSON, Notary Public.

## NO. 142.

### PETITION THAT ADMINISTRATOR RENDER AN EXHIBIT. (§ 224-)

[Title of estate and court.]

To the Honorable Probate Judge, etc.

The petition of, etc., sheweth, that A. B. was duly appointed administrator of said estate on the third day of May, A. D. 1857, that the third term of this court has elapsed since said appointment was made, and said administrator has not ren- § 224. § 222.

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dered to this court any exhibit of the moneys received, the claims presented, and the condition of the affairs of said estate.

- § 224. That your petitioner has a claim against said estate of \$7,000, which has been duly presented and has been approved and allowed by said administrator and by this court, and is now on file for payment in due course of administration; that said administrator, although directly applied to by this petitioner, will not give any information as to the condition of said estate, nor as to the means of payment of its debts including that of your petitioner, as aforesaid; that said administrator also is absent from this county, on business in the mining regions of this State, being there a large operator in quartz, and appears and professes to pay little or no attention to the affairs of this estate;

- § 164. That it is the intention of your petitioner, if it be necessary, to move for the sale of real estate to pay the debts of said estate, but he cannot ascertain by application to said administrator sufficiently, the condition of said estate to determine that necessity,

- § 225. Wherefore your petitioner prays that said administrator may be cited to appear and render an exhibit, such as is required by the statute to be made by an administrator at the third term after his appointment, within such time as to this court may seem just, and which your petitioner prays may not exceed ten days.

C. D.

[Sworn to, as in No. 85.]

#### NO. 143.

#### ORDER FOR CITATION. (§ 225.)

[Title of estate and court.]

On reading and filing the petition of C. D., and it being shown to the satisfaction of this court, by the oath of said petitioner and by the testimony offered therewith, that the facts therein alleged are true, and the showing therein and thereby made by said C. D. being considered sufficient;

- § 225. It is hereby ordered that a citation issue against A. B., the said administrator, requiring him to appear before this court, at the court room thereof, at the City Hall, in the city and county of San Francisco, on the 8th day of August, 1857, at 11 o'clock, A. M., the same being a day of the term of this court, and render an exhibit of the said estate, such as is required by the statute to be rendered at the third term of the court after the appointment of an executor or administrator, and such as may be sufficient to meet the object of said petitioner, as set forth in his application.

M. N., Probate Judge.

[Dated, etc.]

#### NO. 144.

#### ORDER TO SHOW CAUSE, ETC., ON FAILURE TO RENDER AN EXHIBIT AS ORDERED. (§ 227.)

[Title of estate and court.]

- § 225. On reading and filing due proof of service of the citation ordered in this matter, on the 20th day of July, 1857, on the application of C. D. requiring A. B., administrator of this estate, to render an exhibit of said estate to this court on the 8th day of August, 1857, and said time having elapsed and said administrator not having rendered said exhibit; [or and it appearing to this court, upon the showing of said petitioner, that the exhibit filed by said administrator is only partial and does not contain a full statement of said estate, and such as to enable said petitioner to ascertain the necessity of a sale of real estate to pay debts;]

- § 227. It is hereby ordered, that said administrator do, within five days, furnish a full and complete exhibit of said estate, according to the terms of the statute specifying such exhibit; [or, It is hereby ordered that a citation issue against said administrator to appear and show cause why an attachment should not issue; or, It is hereby ordered, that his letters of administration be and the same are hereby revoked.]

M. N., Probate Judge.

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## NO. 145.

### EXCEPTIONS TO EXHIBIT. (§ 226.)

[Title of estate and court.]

C. W. Kendall, one of the creditors of this estate, presents his objections in writing to the exhibit filed in this court on the first day of May, 1857, by E. L., administrator, as follows :

1st. That said administrator has allowed and approved the claims of A. Oakey Hall against the said estate for \$5,000, without the same being accompanied by the proper and legal affidavit and without vouchers, and said claim this petitioner alleges is not due in point of fact. § 181.

2d. That he has allowed and approved the claim of Willard L. Felt which, as appears by the date thereof, is barred by the statute of limitations. § 185.

[Dated, etc.]

C. W. KENDALL,  
By WM. MATTHEWS, his Attorney.

## NO. 146.

### PETITION TO COMPEL AN ACCOUNT. (§ 228.)

In the Matter of etc. In Probate Court, etc.

To the Hon. the Probate Judge, etc. The petition of Frederick Perring, respectfully sheweth :

That your petitioner is a creditor of said deceased ; that his claim amounting to the sum of two thousand dollars has been duly presented and approved, and is filed in court for payment ; that C. D., the administrator of this estate was appointed and qualified as such, on the 10th day of May, 1857, more than one year ago, and that he has never filed an account of his administration.

Wherefore, your petitioner prays that said administrator be compelled to render a full account of his administration to this time, or that his letters be revoked, and for that purpose, that a citation be issued, requiring him to appear and show cause why an attachment should not issue. § 228.

FREDERICK PERRING,

[Sworn to as in No. 35.]

## NO. 147.

### ORDER ON THE FOREGOING. (§ 228.)

In the Matter of, etc. In Probate Court, etc.

On reading and filing the petition of A. B., duly verified, praying that C. D., the administrator of the estate of E. F., deceased, be compelled to render an account.

It is hereby ordered, that the said C. D., render a full account of his administration of said estate, and file the same in this court, on, or before the tenth day of June, 1858 ; and upon failure thereof, that a citation issue, requiring him to appear and show cause before this court, why an attachment should not issue. Such citation to be made returnable in ten days from that day. § 228.

Dated, June 1st, 1857.

M. N., Probate Judge.

## NO. 148.

### CITATION. (§ 228.)

In the Matter of the Estate }  
of } In Probate Court.  
E. F., Deceased. } City and County of San Francisco.

The People of the State of California, to the Sheriff of the City and County of San Francisco, greeting ;

By order of this court, you are hereby required to cite C. D., administrator of the estate of E. F., deceased, to appear before this court at the court room thereof, at § 228.

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- § 228. the city hall, in the city and county of San Francisco, on the 20th day of June, 1858, at 11 o'clock, in the forenoon of that day, then and there to show cause why  
 § 290. an attachment should not issue for failing to render a full account of his administration as required by the order of this court heretofore made, and make due return  
 § 289. hereof.

Witness, the Hon. M. C. Blake, Judge *ex officio* of our probate court, in and for  
 [SEAL.] the city and county of San Francisco, with the seal of said court affixed,  
 this 11th day of June, A. D., 1858.

Attest:

WILLIAM DUER, Clerk,  
 By CHARLES S. CAPP, Deputy.

[For form of Attachment, see *ante* forms No. 65 and 66.]

## NO. 149.

## REVOCATION OF LETTERS FOR FAILING TO ACCOUNT AS ABOVE ORDERED. (§ 230.)

In the Matter of, etc. In Probate Court, etc.

- § 228. Application having been made to this court requiring C. D., the administrator herein, to render a full account of his administration, and order having been made on the 1st day of June, 1857, that such account be rendered within ten days from that date, or that citation issue requiring the said administrator to show cause why his letters of administration should not be revoked; said administrator not having rendered any account, and the period of one year and more having elapsed since the time of his appointment; and due proof being now made to this court and filed, that said order was duly served upon said C. D., administrator, and that having  
 § 290. failed to file his account as ordered within ten days, said citation was duly issued, and is now returned into court; and it appearing by the return of the Sheriff, duly  
 § 230. endorsed thereon, that C. D., administrator as aforesaid, conceals himself, (or has absconded or resides out of the county) so that the said citation cannot be personally served, and thirty days having elapsed since the time prescribed by law for  
 § 228. filing said account, to wit: one year after the time of his appointment, and he having still failed and neglected to render his said annual account. It is hereby ordered, that his letters of administration be, and the same are hereby revoked.

June 1st, 1857.

M. N., Probate Judge.

## NO. 150.

## REVOCATION OF LETTERS AFTER COMMITMENT. (§ 230.)

In the Matter of, etc. In Probate Court, etc.

- § 228. A. B., executor of the above named estate, having been duly cited herein to show cause why an attachment should not issue against him for failing to render an  
 § 228. account of his administration, and upon the return thereof, having failed to show any just and proper cause, and said attachment having been executed, and said executor having been committed into custody thereon, and the period of thirty days  
 § 230. having elapsed since said commitment, and said account not having been rendered and filed, it is hereby ordered, that the letters testamentary heretofore issued to said A. B., executor, be, and the same are hereby revoked, and that his commitment be discharged.

M. N., Probate Judge.

Dated, etc.

## NO. 151.

## ORDER APPOINTING DAY FOR SETTLEMENT OF ACCOUNT. (§ 233.)

In the Matter of, etc. In Probate Court, etc.

- § 249. A. B., administrator, having filed his annual (or final) account of his administration of the estate of C. D., deceased, in this court, and rendered the same for settle-  
 § 233. ment; it is ordered, that Monday, the 5th day of October, 1857, being a day of

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term of this court, to wit: of the term of 1857, at eleven o'clock, A. M., be appointed for the settlement of the same, and that the clerk of the court give notice thereof, by posting up notices in at least three public places in this county, at least ten days before said day of settlement, according to law.

M. N., Probate Judge.

September 20th, 1857.

## NO. 152.

### NOTICE FOR POSTING OF SETTLEMENT OF ACCOUNT. (§ 238.)

In the Matter of, etc. In Probate Court, etc.

Notice is hereby given, that the account of A. B., administrator of the estate of C. D., deceased, has been rendered to said court for settlement, and that Monday, October 5th, 1857, at 11 o'clock, A. M., has been duly appointed by said court for settlement; at which time, any person interested in said estate, may appear and file his exceptions in writing to said account, and contest the same.

San Francisco, Sept. 20, 1857.

M. N., Probate Judge.

[For proof of posting notices, see *ante*, No. 17.]

§ 238.

## NO. 153.

### APPOINTMENT OF GUARDIAN *ad litem* ON SETTLEMENT OF ACCOUNT' (§ 235.)

In the Matter of, etc. In Probate Court, etc.

The account of A. B., administrator of the estate of C. D., deceased, having been rendered for settlement, and it appearing to the court that E. W., a minor, is interested in the estate. It is hereby ordered, that Horace P. Janes, Esq., a disinterested person, be appointed to represent the said minor, and on his behalf, to appear on the settlement of said account and contest the same as may be for the best interest of said minor.

§ 235.

M. N., Probate Judge.

Sept. 20th, 1857.

## NO. 154.

### EXCEPTIONS TO ACCOUNT OF ADMINISTRATOR. (§ 234.)

In the Matter of, etc. In the Probate Court, etc.

Horace P. Janes, duly appointed by this court, guardian *ad litem*, to represent the minor heirs of the above named estate upon the settlement of the account rendered by A. B., administrator, contests the said account, and says, that the same ought not to be allowed and approved as filed, and makes the following exceptions thereto.

1. He contests the claim of Jacob Saxe, on the ground that the same is barred by the statute of limitations, \$872 50 § 185.
2. He contests the claim of James Dellot, being a promissory note alleged to have been made by deceased, on the ground that said note was never made by deceased, and that his pretended signature thereto is a forgery, \$1,000 00
3. He contests the charge made for commissions, expenses, etc., by B. Q. & Co., auctioneers, on the sale of real estate, as being excessive, and containing items not allowed by law, \$732 81 § 219.
4. He contests the charge by said administrator for carriage hire, as being unnecessary, \$175 00 § 219.
5. He contests the charge of repairs to tenements on Jackson street for lack of voucher, \$188 50 § 114.
6. He contests the charges of administrator's commissions as being more than authorized by law, \$4,872 25 § 221.

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7. He contests all the items over twenty dollars, not accompanied by vouchers.  
 § 232. 8. He contests the amount of estate accounted for, said administrator not showing  
 § 216. that the deficiency between his account and the amount charged in the inventory  
 § 217. is without his fault.  
 § 218. 9. He contests said account, because said administrator has not accounted to the  
 § 217. estate for profits made by compromising certain claims.  
 § 220. October 5th, 1857.

HORACE P. JAMES, Guardian *ad litem*, etc.

#### NO. 155.

#### APPOINTMENT OF AUDITOR. (236.)

In the Matter of, etc. In Probate Court, etc.

- A. B., the administrator of this estate, having rendered his account for settlement, and notice of such settlement having been duly given for this day as ordered  
 § 236. by the court, and Horace P. James, Esq., the guardian *ad litem*, appointed by this court to represent the minor heirs interested herein upon the settlement of said account, having appeared and filed exceptions thereto.

It is hereby ordered, that the said account be referred to William H. Sharp, Esq., as auditor and referee, to examine and pass upon the same, and make report to this court within one week, and that the settlement of said account be continued until the 12th October, inst., at eleven o'clock, A. M.

M. N., Probate Judge.

October 5th, 1858.

#### NO. 156.

#### ORDER OF SETTLEMENT OF ANNUAL ACCOUNT.

In the Matter of, etc. In Probate Court, etc.

- § 228. The annual account of A. B., administrator herein, heretofore rendered, coming on for settlement on the 5th day of October inst., at which time proof was made to  
 § 236. the satisfaction of the court and filed herein, that due notice of the settlement thereof had been given, and Horace P. James, Esq., duly appointed guardian *ad litem* to  
 § 234. represent the minor heirs, appeared and filed his exceptions to said account, and  
 § 236. the said account was referred to Wm. H. Sharp, Esq., as an auditor to examine the same and report thereon, and said settlement was continued to this day by order of  
 § 237. the court duly entered upon the minutes thereof,

- And now upon this 12th day of October, 1857, at eleven o'clock, A. M., the time appointed as aforesaid, the said matter coming on to be heard and the report of said  
 § 236. auditor being filed, showing that the said account is correct and is duly sustained  
 § 231. by sufficient and proper vouchers, except as to the item of \$158 50, and that the exceptions of said guardian *ad litem* are without foundation, except as to the item  
 § 221. above named, the item for commissions, \$4,872 25. the same not being chargeable until a final account be rendered, and the item of the claim of Jacob Saxe for \$872  
 § 135. 50, which is barred by the statute of limitations, making in all the sum of \$5,408  
 § 236. 25 and no exceptions being made to the said report, the same is confirmed.

- And the allegations of the various parties being heard and considered, It is hereby ordered, adjudged and decreed, that the said account being so settled, to wit: the said items of credits to said administrator to the amount of \$5,408 25 being disallowed,  
 § 237. the said account be and the same is hereby in all other respects allowed and confirmed.

- And it appearing that the said administrator has in his hands the sum of \$25,872  
 § 239. in cash, that the debts due by said estate are all of the 5th class in the order of payment; the funeral expenses, the expenses of the last sickness and the expenses of administration to this period having been paid, and that said debts, amounting  
 § 181. to the sum of \$50,000, have been duly presented and allowed in the manner required by law.  
 § 182.

- It is further ordered, adjudged and decreed, that said administrator do pay up-  
 § 245. on said debts a dividend of fifty per cent. out of the said sum of \$25,872, in his



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hands as aforesaid, to wit: That he pay to the creditors hereinafter named the amounts fixed after their names respectively, as follows:

B. C. & Co.,	-	-	-	-	-	-	-	\$5,580 00
H. W.,	-	-	-	-	-	-	-	3,110 00
Etc., etc.,	-	-	-	-	-	-	-	etc., etc.

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Making in all the sum of \$25,000, and that he pay to said guardian *ad litem* and said auditor the sum of fifty dollars each for their services herein rendered, leaving in his hands the sum of \$772 cash of the property of said estate;

§ 235.  
§ 236.

And there being still a considerable amount of real estate unsold, and the debts being not all paid,

It is further ordered that this administration be extended for the period of six months for a final settlement of the estate.

§ 247.

M. N., Probate Judge.

October 12th, 1857.

## NO. 157.

### PETITION BY CREDITOR TO COMPEL AN ACCOUNT. (§ 228.)

In the Matter of the Estate of Archibald A. Ritchie, Deceased. } In the Probate Court, of the City and County of San Francisco.

The petition of John F. Osgood, of the city and county of San Francisco, respectfully shows to the court:

That he is the legally authorized attorney in fact of Lawrence Lewis, Jr., and Henry M. Olmstead, assignees of William Platt & Sons, and of Joseph B. F. Osgood, trustee, etc., creditors of the said estate of Archibald A. Ritchie, deceased;

That since the rendering of an account by the administrators and administratrix of said estate they have, as your petitioner is informed by one of said administrators, and believes, sold large amounts of property belonging to said estate, and received large amounts of money the proceeds of said sales, and of sales made prior to the rendition of said accounts, and that said administrators have on hand or should have on hand a sufficient amount of money to make another liberal dividend to the creditors of said estate; that petitioner has repeatedly requested the attorneys of said administrators and administratrix to make such dividend, but they have wholly failed and neglected to comply with such request;

Your petitioner therefore prays that said administrators and administratrix may be cited and required to account to this honorable court for all their transactions since the rendition of their last account and may be ordered to divide amongst the creditors of the estate as much as may be found remaining in their hands subject to distribution.

JOHN F. OSGOOD.

[Sworn to, as in No. 35.]

## NO. 158.

### ORDER TO ACCOUNT. (§ 228.)

In the Matter of the Estate of Archibald A. Ritchie, Deceased. } In the Probate Court in and for the County of San Francisco, State of California.

On reading and filing the petition of John F. Osgood, praying that the administrators and administratrix of the said estate account, and that a dividend be ordered to the creditors thereof,

It is hereby ordered, that the administrators and administratrix be cited and required to account to the court for all their transactions since the rendition of their last account, and that Monday, the first day of February next, be fixed for the hearing thereof.

T. W. FREELON, County Judge.

January 18th, 1858.

NO. 159.

APPOINTMENT OF GUARDIAN *AD LITEM* AND CONSENT. (§ 235.)

In the Succession } In the Probate Court  
of } of the County of San Francisco.  
Archibald A. Ritchie, Deceased. }

The account to date, of the administrators and administratrix of said decedent, coming in this day on request of Thornton, Williams & Thornton, attorneys for said administrators and administratrix, that a guardian *ad litem* be appointed to represent the interests of the minor heirs and distributees of the said decedent upon the allowance and settlement of said accounts; It is ordered by the court that Edward J. Pringle be and is hereby appointed guardian *ad litem* for the purpose aforesaid.

T. W. FREELON, County Judge.

I do hereby accept the above appointment.

EDWARD J. PRINGLE, Guardian *ad litem*.

And I do hereby, on behalf of said minor heirs and distributees, consent to the allowance of said accounts and the settlement thereof as presented by the administrators and administratrix.

EDWARD J. PRINGLE, Guardian *ad litem*

March 4th, 1858.

NO. 160.

ORDER ALLOWING ACCOUNT. (§ 237.)

In the Matter of the Estate } In Probate Court,  
of } City and County of San Francisco, March 8, 1858.  
A. A. Ritchie, Deceased. }

The account of the administrators and administratrix of the decedent, above named, heretofore filed, coming up for consideration this day, and it having been proved to the satisfaction of the court, that the proper notice as required by law has been given by the clerk by causing the usual notices to be posted up in three public places in the city and county aforesaid, of the settlement of said account, and that no exceptions have been taken or filed to the allowance of said account, but that the same has been consented to in writing by Edward J. Pringle, the guardian *ad litem*, for the minor heirs of said decedent; it is ordered that the said account be, and the same is hereby allowed.

And it is further ordered, that the usual commissions prescribed by law, be allowed said administrators and administratrix, and that all claims for any further allowance be reserved for the further action of this court.

T. W. FREELON, County Judge.

NO. 161.

ORDER FOR PAYMENT OF DIVIDEND. (§ 241, 248.)

In the Matter of the Estate } Court of Probate,  
of } for the County of San Francisco and  
A. A. Ritchie, Deceased. } State of California.

In this succession, on motion of Thornton, Williams & Thornton, attorneys of the administrators and administratrix, a dividend of ten per cent on the amount now due is ordered to be paid by the said administrators, Robert H. Waterman and James N. Hamilton, and the administratrix, Martha A. Ritchie, on all claims which have been allowed, except those secured by mortgages, unless the debt exceed in value the mortgaged property, in which case the same dividend may be paid on said excess. Upon making payment, the said administrators and administratrix are required to take the receipt of such creditor, referring in each receipt to this order by its date.

This order is made without prejudice to the rights claimed by said Martha H. Ritchie, widow of the said decedent, to the common property of said estate, viz:

to one half of the said common property, free from any charge or obligation to pay any of the debts at any time contracted by the said decedent. The administrators and administratrix will make report to this court of the payments under this order.

T. W. FREELON, County Judge.

## NO. 162.

## PETITION BY EXECUTORS FOR ORDER TO PAY DIVIDEND. (§ 241, 242.)

To the Hon. T. W. Freelon, Judge of the County Court for the County of San Francisco, and *ex officio* Probate Judge.

The petition of H. W. Halleck, A. C. Peachy and P. W. Van Winkle, executors of the last will and testament of Joseph L. Folsom, deceased, by their attorney, Frederick Billings, respectfully represents: That the following schedule marked "A," contains a list of the claims against the estate of the said Folsom, allowed by the executors and approved by your Honor, as probate judge, and now filed in court, and the claims established against said estate by judgments, (exclusive of the claims allowed by your petitioners in favor of the trustees of the "City Market Company," and of a judgment in favor of the United States, in the United States Circuit Court, which judgment has been fully paid,) and also a list of the original amounts of mortgages on parts of said estate, the rates of interest which they severally bear, and the amounts paid on each from the proceeds of the sales of the property so mortgaged; which schedule, they pray may be taken as a part of this petition.

And your petitioners further represent that they are informed and believe that all the claims therein set forth have been filed with the clerk of this court.

And your petitioners further represent that they have on hand moneys belonging to the said estate for distribution, sufficient to pay forty (40) per cent on said claims and judgments, principal and interest.

Your petitioners therefore respectfully pray, that an order may be entered, authorizing them to pay said creditors of said estate named in said schedule, forty (40) per cent, principal and interest, on the amount due to each, on the fifteenth day of June, A. D., 1857, and that the payments be endorsed on said claims, and that when so paid, your petitioners may have credit therefor, and for the amount thereof, in their account with said estate in this court, excepting the said claim of the Trustees of the City Market Co., and said judgment in the United States Circuit Court, and also a mortgage held by Abel Guy, dated the 9th day of September, A. D., 1854, for \$40,000, with interest, at the rate of 2 1-2 per cent per month, which said mortgage has been a subject of litigation between your petitioners and said Guy, in the Fourth Judicial District Court in which said court has decreed (in May last) the said Guy to credit said mortgage with the sum of fifteen thousand four hundred and fifty (15,450) dollars, for the purchase of property by him, covered by said mortgage at a sale of your petitioners of real estate held on the 13th and 14th days of November, 1856, for which said judgment, the said Guy has taken the preliminary steps for an appeal to the Supreme Court.

FREDERICK BILLINGS,  
Attorney for Executors.

[Here follows the Schedule referred to.]

## NO. 163.

## ORDER TO MAKE PARTIAL PAYMENT. (§ 241 to 343.)

In the matter of the application of H. W. Halleck, }  
A. C. Peachy and P. Warren Van Winkle, executors }  
of the estate of Joseph L. Folsom, deceased, for an }  
order to make a partial payment of the debts al- }  
lowed against the estate by the Executors, and }  
those established against the estate by judgments. }

Upon reading and filing the petition of the said executors, and the schedule of creditors of said estate thereto annexed, and on motion of Frederick Billings, Esq., attorney for the executors, and it appearing to the satisfaction of the court that the statements set forth in the petition of which the schedule is made a part, are true:

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It is hereby ordered and decreed, that the said executors do pay forthwith, upon presentation of their respective claims, the said creditors, forty per cent on the amount thereof, principal and interest, and that the said claims filed in this court, as represented in said schedule, be withdrawn by the respective creditors or their assigns, for the purpose of presentation to said executors, so that the amount paid can be endorsed thereon, and then returned to the files of this court by the said creditors.

And it is further ordered, adjudged and decreed, that all payments made by said executors, under, and by virtue of this order, be allowed and credited to them in their accounts as executors of said estate.

It is further ordered, that this order for a partial payment of forty per cent, does not include the payment of the claims of the trustees of the City Market Company, nor of the said judgment in the United States Circuit Court, nor of the mortgage by the said Folsom to Abel Guy, dated the 9th of September, 1854, for \$40,000 which has been the subject of litigation between the said Guy and the said executors.

T. W. FREELON, County Judge.

#### NO. 164.

ISSUE ON EXCEPTION TO ACCOUNT, FRAMED AND CERTIFIED TO DISTRICT COURT. (§ 234, 294, 295.)

In the Matter of the Estate of William W. Cates, Deceased.	}	In Probate Court, City and County of San Francisco.
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Richard F. Perkins, the administrator of the estate of William W. Cates, deceased' having rendered a final account of his proceedings as such administrator, from which it appears that said administrator has allowed as a just and valid claim against said estate a certain promissory note for eleven hundred dollars, dated October 16th, 1853, presented by one C. B. Cates and purporting to have been executed by said decedent and James Grant, and Mary Grant, his wife, heirs at law of said decedent, having filed written objections to the passing of said account, alleging that said promissory note so presented to and allowed by said administrator is false and fraudulent, and that the same is a forgery; Now, on motion of Messrs. Janes, Lake & Boyd, attorneys for said objectors, counsel for said C. B. Cates the claimant, consenting thereto, it is ordered that the issue of fact thereby joined, to wit: "Whether said promissory note so presented to and allowed by said administrator be or be not false and fraudulent, and a forgery," be and the same is hereby certified to the District Court of the Twelfth District in and for the city and county of San Francisco for trial.

M. C. BLAKE, Probate Judge.

#### NO. 165.

ORDER ALLOWING FINAL ACCOUNT. (§ 237.)

In the Matter of the last Will and Testament of Henry A. Harrison, Deceased.	}	In the Probate Court of the City and County of San Francisco, March 15th, 1858.
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Present: the Honorable T. W. Freelon, Probate Judge.

On reading and filing the final account of William T. Hoffman, executor of the last will and testament of Henry A. Harrison, deceased, filed in this court on the first day of March, A. D. 1858, and also, on reading and filing the report of D. P. Belknap, Esq., the auditor to whom it was referred by this court, by order dated on the said first day of March, A. D., 1858, to audit and report on the same by which it appears that said account is in all respects correct. And upon hearing, the said William T. Hoffman, executor, and E. W. Taylor, Esq., guardian *ad litem*, appointed to represent the interests of the absent minor heirs and devisees upon the settlement of said account, no one appearing to oppose; and it having been first fully proved to the satisfaction of this court that due and legal notice has been given of the time and place of settlement as required by law. It is hereby ordered, adjudged and decreed, that the said account of the said executor be, and the same is hereby passed and allowed, and the said report is hereby accepted and confirmed.

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And it is further ordered, that the said executor pay to E. W. Taylor, Esq., guardian, *ad litem*, the sum of twenty-five dollars, and to said auditor, the sum of twenty dollars, their fees in the premises, out of the estate of said deceased.

T. W. FREELON, County Judge.

## NO. 166.

### ORDER ALLOWING GUARDIAN'S ACCOUNT. (§ 287.)

At a Probate Court held, in and for the City and County of San Francisco, on the fifteenth day of December, A. D., eighteen hundred and fifty-seven.

Present: Hon. T. W. Freelon, Probate Judge.

In the Matter of the Estate and guardianship )  
of  
Mary Evelina Brunell, an infant. }

On reading and filing the annual account of Orson A. Reynolds, guardian of the person and estate of the said Mary Evelina Brunell, an infant, filed in this court on the thirtieth day of November, A. D., eighteen hundred and fifty seven, and the vouchers appertaining thereto; and also the statement and petition of said guardian, annexed to said account, and on examining said account and vouchers, and the same appearing in all respects satisfactory to this court, and also, on filing the notice required by law to be given of the settlement of said account with the proof of publication or posting, as required by law, and no person appearing to oppose. Now, therefore, it is hereby adjudged and decreed, that the account of the said Orson A. Reynolds, guardian, etc., be, and the same is hereby passed, approved, and allowed, as rendered by him. And it is hereby further ordered and decreed, that the said guardian be, and he is hereby allowed the sum of seventy-five dollars per month, for the support, maintenance and education of the said Mary Evelina Brunell, for and during the year following the seventh day of October, A. D., eighteen hundred and fifty seven, to be paid out of the income of the estate of said infant. December 14th, 1857.

T. W. FREELON, County Judge.

## NO. 167.

### DECREE OF CONFIRMATION OF FINAL ACCOUNT AND CLOSING THE ADMINISTRATION.

At a Probate Court held at the City Hall, in the city and county of San Francisco, at the January Term of 1858, of said court, to wit: on the first day of February, 1858,

Present: Hon. T. W. Freelon, Probate Judge.

In the Matter of the Estate )  
of  
Percy G. Clare, Deceased. } Final Decree.

Whereas Thomas H. Selby, heretofore to wit: on the first Monday of January, 1857, duly appointed by this court administrator of the estate of Percy G. Clare deceased, on the 11th day of January, 1858, filed in this court his final account as such administrator with a petition praying that a day be appointed for a settlement of the same, and that the administration be closed, and thereupon a day having been duly appointed by this court, to wit: the 25th day of January, 1858, for the settlement of said account and for hearing the proofs and allegations of said party,

On which day, at the time and place named in said order, said administrator appeared in person and by J. A. McDougall, Esq., his attorney, and due proof was made to the satisfaction of this court and filed herein, that notice of the settlement of said account had been given by the clerk of this court by causing notices to be posted in three public places in the said county, on the day of filing said account, setting forth the name of this estate and of the administrator, and of the day appointed by this court for the settlement of said account, the same being a day of term of this court,

§ 248.

§ 249.

§ 233.

§ 238.

§ 238.

- And also appeared S. H. Brodie, Esq., duly appointed by this court to represent the minor heirs of this estate upon said settlement,
- § 235. And also appears Simon L. Jones and Edward W. Willett, creditors of said estate, by O. L. Shafter, Esq., their attorney,
- § 236. And the hearing and allegations of the respective parties being adjourned to this day by order of the court duly entered upon the minutes thereof,
- § 287.
- And now upon this first day of February, 1858, the said matters coming on for final settlement, and the report of James D. Thornton, Esq., the auditor to whom was referred said account, being filed, showing that said account is correct and fully sustained by proper and legal vouchers on file, and no exceptions having been filed to the same, and a full investigation of the said administration having been made before the court, and all the parties interested being heard, and the court having duly considered the matter of said final account and the proceedings of the administration,
- And it appearing to this court from the showing and the proofs, as follows, to wit:
- That the said administrator in his account has duly charged himself with the whole of the estate of the deceased which has come to his possession, at the value of the appraisement contained in the inventory, and also with all the increase, profit and income thereof, and that he has accounted for and explained, to the satisfaction of this court, all losses by the decrease or destruction of any part of the estate, and by uncollected debts, showing that he is not responsible and that the same are without his fault;
- § 216.
- § 217.
- § 218.
- § 128. That the requisite notice to creditors, in proper form, was duly published as directed by the order of this court, immediately after his appointment, and that all the proceedings in the administration have been conducted fairly and justly and in accordance with the provisions of the statute regulating the same, and the said administrator has not in any manner mismanaged nor wasted the said estate, and that all the proceedings necessary to a final settlement of said estate have been had,
- § 239.
- § 242. That the said administrator has paid debts of the 1st and 2d classes, to wit: the funeral expenses, the expenses of the last sickness, and the allowance made to the family of the deceased and all the necessary expenses of administration up to this time;
- That there are no debts or claims established against said estate of the 3d class, to wit: debts having a preference by the laws of the United States, and that there is a sufficient amount of money in his hands to pay such debts of the 4th class, to wit: judgments rendered against said deceased in his life-time, and mortgages in the order of their date, as are established to be preferred claims;
- § 239.
- That there are three mortgage claims which were a lien upon one and the same tract of land of different dates; which said land has been sold in due course of administration, and has realized a sum sufficient for the payment in full of the first of said mortgages, the same being for the sum of \$5,000, due to E. H. Washburn, and for the payment of one-half of the second mortgage, the same being for \$4,000 and due to Henry S. Austin; and that the said mortgage claims have been duly presented and approved and filed as established debts;
- § 186.
- § 240.
- § 128
- to 135.
- That after the payment of the said judgments and said first mortgage and the one half of the second mortgage, there will not be sufficient funds in the hands of said administrator to pay in full debts of the 5th class, to wit: all other demands against the estate, which with the said unpaid half of said second mortgage and with said third mortgage, amount to the sum of \$37,898 50, but that the said remaining assets are sufficient to pay a dividend of sixty-two and one-third per centum of said claims, together with the remaining expenses of administration,
- § 241.
- § 243.
- Now therefore, it is hereby ordered, adjudged and decreed, that the said account of said administrator be and the same is hereby fully and in all respects allowed and confirmed.
- § 237.
- And it is further ordered, that after paying the remaining expenses of administration, which consist of the commissions of said administrator, as estimated in his said account, the fees of the said auditor and the guardian *ad litem*, which are hereby fixed at fifty dollars each, and the costs of court which have been ascertained and taxed at thirty-two dollars and fifty cents, the said administrator do pay the whole amount due on said first mortgage, and the one-half of the amount of said second mortgage, and upon the remaining debts, being the 5th class as above set forth, he pay the remaining funds in his hands, the same constituting a *pro rata* dividend of sixty-two and one-third per centum, upon the said claims respectively,
- § 242.
- § 221.
- § 236.
- § 235.
- § 242.
- § 186.
- § 240.
- § 241.
- § 243.

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according to to their several amounts, as set forth in the said account, a full list of which said debts and the respective sums to be paid thereon, is as follows :

[Here follows a list of such debts and the dividends.]

§ 243.

And it is further ordered, adjudged and decreed, that upon the payment of the said several sums herein above ordered, and upon filing due and proper vouchers therefor in this court, that said administrator shall be entitled to a full and final order of discharge, and that his sureties shall thereupon and thenceforth be discharged from all liability for the future acts of said administrator.

§ 245.

§ 279.

Let the above order be entered.

T. W. FREELON, Probate Judge.

## NO. 168.

### PETITION FOR DISTRIBUTION TO HEIR BEFORE CLOSE OF ADMINISTRATION. (§ 250.)

In the Matter of the Estate }  
of } Probate Court  
Alonzo Hill, Deceased. } of the City and County of San Francisco.

To the Honorable Thomas W. Freelon, Judge of Probate, in and for the city and county of San Francisco.

The petition of Washington Hill, a resident of Spencer, in the county of Worcester and Commonwealth of Massachusetts, shows to your Honor, that he, the said Washington Hill is the father and sole heir to the estate of the said Alonzo Hill, late of said city and county of San Francisco, who died intestate on the 23d day of May, 1857, and leaving no surviving wife and no issue.

And your petitioner further shows, that Robert C. Rogers, Esq., public administrator of said city and county, is the administrator of said estate, the total value whereof, as appears by the inventory and appraisalment thereof, on file in said court, amounts to the sum of two thousand six hundred and eighty (2,680) dollars and seventy-five (75) cents, and that more than three terms of said probate court have passed since the issuing of letters of administration on said estate to the said administrator, and that as your petitioner is informed and believes, there are no debts or claims outstanding against the said estate.

Wherefore, your petitioner prays for an order of distribution of the said estate, and that all the property and funds belonging to the same, remaining in the hands of the said administrator after payment of the costs and expenses of administration, may be given to the petitioner upon the execution and delivery to the said administrator of the indemnity bond in such cases by law required, and for such other and further order and relief in the premises as may be just. And your petitioner will ever pray, etc.

WASHINGTON HILL.

By his attorney in fact, JOHN H. BREWER.  
[Sworn to as in No. 35.]

## 169.

### ORDER FOR HEARING ON SAME, AND NOTICE. (§ 251, 253.)

In the Matter of the Estate }  
of } Probate Court of the  
Alonzo Hill, deceased. } City and County of San Francisco. Order of notice.

Upon reading and filing the petition of Washington Hill, praying for an order of distribution of his share of the estate of Alonzo Hill, deceased, it is hereby ordered, that notice be given according to law, to Robert C. Rogers, Esq., administrator of said estate, and to all persons interested in said estate, to be and appear in said probate court, at the city hall, in the city and county of San Francisco, on Monday, the 25th day of January, A. D., 1858, at eleven o'clock, A. M., of that day, or as soon thereafter as the matter can be heard, then and there to show cause, if any they have, why the prayer of said petition should not be granted, and an order of distribution of said estate as prayed for, should not be made.

T. W. FREELON, County Judge.

San Francisco, January 11th, 1858.

NO. 170.

NOTICE OF HEARING, TO BE POSTED. (§ 251, 253.)

State of California, }  
City and County of San Francisco. } In Probate Court.

Notice is hereby given, that Alonzo Hill, deceased, having filed in this court his petition, praying that his share of the estate of said deceased, of which estate Robert C. Rogers is administrator, be given to him upon his giving to said administrator a bond of indemnity as provided by law; the hearing of the same has been fixed by said court for Monday, the 25th day of January, 1858, at eleven o'clock, in the forenoon of said day of the January term of 1858, at the court room thereof at the city hall, in the city and county of San Francisco, and all persons interested in said estate are notified then and there to appear and show cause if any they have, why the said petition should not be granted.

San Francisco, January 11th, 1858.

WILLIAM DUEB, Clerk.

[Proof of posting as in No. 17, *ante*.]

NO. 171.

DECREE ALLOWING SUCH DISTRIBUTION. (§ 250 to 256.)

In the Matter of the Estate }  
of } In the Probate Court,  
Alonzo Hill, Deceased. } of the City and County of San Francisco.

This cause having come on for a hearing on the twenty-fifth day of January, A. D., 1858, before the probate court of the city and county of San Francisco, upon the petition of Washington Hill, claiming to be the sole heir at law of the said Alonzo Hill, deceased, and praying that a distribution be made of the whole of the property and funds belonging to the said estate, remaining in the hands of the administrator thereon, after payment of the costs and expenses of administration, and that the same should be delivered over to him, the said sole heir at law, and the said hearing on the said matter, having on the said 25th day of January been continued by the said court to the first day of February, A. D. 1858, and on the said first day of February, the said cause or matter having again come on for a hearing, and due proof to the satisfaction of the court having then been made of the service on the administrator, and posting of the notice in such cases required, according to law, commanding all persons interested in the said estate to be and appear in the said probate court on the said 25th day of January, then and there to show cause, if any they had, why the prayer of said petition should not be granted, and such distribution as prayed for, should not be made; and it appearing to the court that more than three terms of the said court have elapsed since the issuance of letters of administration on said estate, and before the making of the said application, and that upon the proof, the said petitioner, Washington Hill, is the sole heir at law of the said decedent, and that there are few or no debts due from the said estate, and that good cause exists for granting the prayer of the said petitioner, and no objection thereto having been made: Now, then it is hereby ordered, adjudged and decreed, that distribution of said estate be made, and that Robert C. Rogers, Esq., the administrator thereon, do transfer, set over and deliver unto the said Washington Hill, all the property and funds belonging to the said estate, remaining in his hands, or under his control, after payment of the costs and expenses of administration on said estate, upon the execution and delivery to him of a bond of indemnity in the penal sum of eighteen hundred dollars, with two sufficient sureties to be approved by the judge of this court of probate, conditioned, that the said Washington Hill, shall, and will, whenever required, pay any debt or debts, which may be found legally due to any person or persons, from the said estate.

Given in open court, at a regular term thereof, this first day of February, A. D., 1858.

T. W. FREELON, County Judge.



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NO. 172.

## PETITION FOR DISTRIBUTION.

In the Matter of the last Will and Testament  
of  
Henry A. Harrison, Deceased. }

In the Probate Court  
of the County of San Francisco and  
State of California.

To the Honorable the Probate Court of the City and County of San Francisco.

Your petitioner, William T. Hoffman, executor of the last will and testament of Henry A. Harrison, deceased, respectfully represents to this Honorable Court, that he has fully administered upon said estate and rendered his account of his administration, which has been duly audited, and the report of the auditor to whom the same was, has been this day duly confirmed by the order of this court.

You petitioner further shows that it appears from said account and the auditor's report thereon, that there remains a surplus of said estate after paying the debts duly proved and allowed against said estate with the expenses of administration, the following real and personal estate, to wit: one lot on Sansome street, twenty-eight feet front by one hundred and thirty-seven feet six inches in depth, westerly, with a wooden ware-house thereon, valued by the appraisers upon said estate at the sum of four thousand seven hundred dollars. (\$4,700.)

The cottage situate on Broadway street, and a lot upon which the same was erected, being thirty-four feet four inches and a quarter in front, on Broadway street by a depth of one hundred and thirty-seven feet six inches in depth, northerly, valued by the appraisers at the sum of two thousand and five hundred dollars, (2,500) which two several parcels of property are particularly set forth and described on the inventory (on file in this court) by metes and bounds.

That there remains also seventy-eight shares of the stock of the Pacific Wharf Company, particularly described in said inventory, and valued by the appraisers on said estate at the sum of thirty-five hundred and ten dollars. (3,510.)

Your petitioner further shows that he has paid all the debts of said estate which have been presented and allowed, and approved by this court, and that he has also paid the expenses of the administration of said estate as will appear by his said account and the auditor's report thereon, now on file in this court, and that he has also paid to Elizabeth S. Harrison, the widow of the deceased, the sum of

towards the allowance granted by the order of this court for the support and maintenance of herself and children, during the administration upon said estate, and that there remains due to her under said allowance at this date, the further sum of for the payment of which, your petitioner has no funds of said estate, except the real and personal estate of said deceased herein before described.

Your petitioner therefore prays, that an order may be made in the matter of the last will and testament of the said Henry A. Harrison, requiring all persons interested in said estate to be and appear before this honorable court upon a day therein to be set and limited, and show cause, if any they have, why an order of distribution should not be made of the residue of the estate between the widow and minor children of the deceased in accordance with the provisions of the will, to wit: one half to the widow of said deceased, Elizabeth S. Harrison, and the other half, equally between Henry A. Harrison and DeWitt Washington Harrison, minor children of said deceased; and that such order may be made in reference to the unpaid balance of the allowance to the widow as this court may deem just and right; that your petitioner, his final account being settled, may be released and discharged from all further responsibility in the premises, and that such other or further order may be made therein as to the court, shall seem meet.

WM. T. HOFFMAN.

[Sworn to as in No. 35.]

NO. 173.

## ORDER OF PUBLICATION ON SAME WITH PROOF OF PUBLICATION.

In the Matter of the Estate  
of  
Henry A. Harrison Dec'd. }

In Probate Court,  
City and County of San Francisco.

On reading and filing the petition of William T. Hoffman, executor of the last will and testament of Henry A. Harrison, deceased, setting forth that he has filed his

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final account of his administration upon said estate in this court, and that the same has been duly audited, allowed and confirmed; and that all the debts and expenses of administration have been fully paid; and that a portion of said estate remains to be divided among the devisees, praying among other things for an order of distribution of the residue of said estate among the said devisees, in pursuance of the terms of the will.

It is ordered, that all persons interested in the estate of the said Henry A. Harrison, deceased, be and appear before the probate court of the city and county of San Francisco, at the court room of said court, in the city hall, in the city and county of San Francisco, on the 19th day of April, A. D., 1858, at eleven o'clock, in the forenoon of that day, then and there to show cause why an order of distribution should not be made of the residue of said estate among the heirs and devisees of the said Henry A. Harrison, deceased, in pursuance of the provisions of the will.

It is further ordered, that a copy of this order be published for four successive weeks before the said nineteenth day of April, 1858, in the "Daily Evening Bulletin," a newspaper printed and published in the city and county of San Francisco.

T. W. FREELOW, County Judge.

(Indorsed :) Filed March 15th, 1858.

D. P. BELKNAP, Deputy Clerk.

State of California, City and County of San Francisco, ss.

C. O. Gerberding, of the said county, duly sworn, deposes and says, that he is one of the proprietors of the "Daily Evening Bulletin," a newspaper published daily in said county, and has charge of all the advertisements in said newspaper, and that the notice in the matter of the last will and testament of Henry A. Harrison, deceased, hereto attached, has been published in the daily Evening Bulletin, from March 17th, 1858, to April 18, 1858, and further sayeth not.

C. O. GERBERDING.

Sworn to this 19th day of April, 1858, before me.

C. J. BRENHAM, Notary Public.

NO. 174.

ORDER OF DISTRIBUTION.

State of California, }  
City and County of San Francisco. } In the Probate Court.

Present: The Honorable M. C. Blake, Probate Judge.

In the Matter of the last Will and Testament }  
of }  
Henry A. Harrison, Deceased. }

Whereas William T. Hoffman, Esq., executor of the last will and testament of Henry A. Harrison, deceased, on the 15th day of March, A. D. 1858, filed his petition in this court setting forth that he had filed his final account of his administration upon said estate in this court and that the same had been duly audited, allowed and confirmed; and that all the debts and expenses of the administration had been fully paid, and that a portion of his said estate remained to be divided among the heirs and devisees of said estate, and praying among other things for an order of distribution of the residue of said estate among the said devisees in pursuance of the terms of the will,

It was ordered by this court that all persons interested in the estate of the said Henry A. Harrison deceased, be and appear before the probate court of the city and county of San Francisco, at the court room of said court in the City Hall of the said city and county of San Francisco, on the 19th day of April, A. D. 1858, at eleven o'clock in the forenoon of that day, to show cause why an order of distribution should not be made of the residue of said estate among the heirs and devisees of the said Henry A. Harrison deceased, in pursuance of the provisions of the will;

And it was further ordered by this court, that a copy of the said order be published for four successive weeks before the said 18th day of April, A. D. 1858, in the Daily Evening Bulletin, a newspaper printed and published in the city and county of San Francisco;

And now on this 18th day of April, A. D. 1858, due legal proof having been made to the satisfaction of this court of the publication of said order and notice in due and legal form; E. W. Taylor, Esq., the guardian *ad litem*, heretofore appointed by this court to appear for and represent and protect the interests of the absent minor heirs and devisees of said estate, appearing on their behalf;

And it appearing from said final account and the auditor's report and order of confirmation thereon that there remains due to the widow of the deceased, Elizabeth S. Harrison, the sum of nine hundred and sixty-one 95 100 (\$961 95) dollars of the amount allowed under the order of this court, for the support of herself and family pending the administration, for the payment of which the executor has no funds left in his hands and which is a lien and claim against the said residue of said estate;

That after paying the expenses incurred since the settlement of his final account there remains in said estate to be distributed a balance of money amounting to the sum of fifty-nine 28-100 (\$59 28) dollars;

Also seventy-eight (78) shares of the capital stock of the Pacific Wharf Company, valued in the inventory at three thousand five hundred and ten (\$3,510) dollars;

Also the dwelling house and lot described in the inventory.

[Here follows description of the property.]

Appraised at the sum of twenty-five hundred dollars.

And also that certain wooden store and lot situate on the westerly side of Sansome street, commencing, etc

[Here follows description of property.]

Appraised at the sum of four thousand seven hundred dollars.

On motion of R. H. Waller, of counsel for the said executor; the said E. W. Taylor, Esq., guardian *ad litem*, of the said minor heirs and devisees being present and consenting thereto. It is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested doth order, adjudge and decree, that the one equal undivided half of the said residue of the real and personal estate herein above described, be, and the same hereby is assigned, and set over to the said Elizabeth S. Harrison, widow of the said Henry A. Harrison, and one equal undivided quarter of the said residue of the said real and personal estate, be, and the same hereby is assigned and set over to each of the said minor heirs and devisees of the said Henry A. Harrison, to wit:

Henry Augustus Harrison and DeWitt Walsh Harrison; to have and to hold unto them respectively, and to their respective heirs and assigns forever, conformably to the provisions of said last will and testament of the deceased, subject however to the payment of the said sum of nine hundred and sixty-one 95 one hundredth dollars, due, and unpaid on said allowance; and that the said Elizabeth S. Harrison, the guardian of the said Henry Augustus Harrison and DeWitt Walsh Harrison, appointed by the said testator in and by his said last will and testament, have the custody of the persons of the said Henry Augustus Harrison and DeWitt Walsh Harrison, and of their share or interest in their said estate for the benefit of her said children.

And it is further ordered, that the said William T. Hoffman, executor as aforesaid, pay over and deliver to the said Elizabeth S. Harrison or to her attorney, the said sum of fifty-nine dollars and twenty-three cents, and the said seventy-eight shares of the Capital Stock of the Pacific Wharf Company, together with the title deeds and papers remaining in his possession belonging to the said estate, and that upon such payment and delivery, and upon the production by said executor of a receipt therefor from the said Elizabeth S. Harrison, or from her attorney, remitting the balance of said allowance, and for the payment of all her claims and demands against the said William T. Hoffman, as such executor, that then the said administration be closed, and the said executor be discharged from his executorship and from all further responsibility as executor of said estate.

M. C. BLAKE,

County Judge, and *ex officio*, Probate Judge.

San Francisco, April 19th, 1858.

DECREE OF DISTRIBUTION, WITH ORDER OF CONTRIBUTION BY DEVISEES AND LEGATEES. (§ 181, 258.)

In the Matter of the Estate }  
of } At a Term of the Probate Court, held, etc., etc.  
A. B., Deceased. }

[For preliminaries see preceding Form and Form No. 176, and conclude as follows:]

And it further appearing to this court that after the settlement and allowance of the account of said executor there remains in his hands the sum of three thousand dollars, and there also remains the real estate hereinafter described, subject to distribution,

And it further appearing that by the will of said deceased all his personal estate is bequeathed to C. D., E. F. and G. H., in equal portions, except as hereinafter stated,

§ 181. And it further appearing to this court that under and by the provisions of the said will the dwelling house of the deceased, with the lot of land upon which the same is situated, and the furniture therein were devised and bequeathed to C. D., and that in the course of administration it became necessary to sell said house and lot and said furniture to pay the debts of said deceased, and that such property was duly sold and the sale confirmed by the order of this court, and said property being ascertained by such sale to be of the value of ten thousand dollars,

And it further appearing that all the remaining property of said estate that has not been appropriated to the payment of debts and the expenses of administration has been devised and bequeathed to E. F. and G. H., and is worth, as appears by the report of H. J. Labatt, referee, duly filed herein and confirmed, the sum of \$50,000,

And it further appearing, that the said property so devised and bequeathed to said E. F. and G. H., consists of a certain tract of land in the county of Tehama, State of California, known as the rancho "Willy," and described as follows: [description] of the value of \$40,000, and the cattle thereon valued at \$10,000 and is taken by them jointly and in common, and said E. F. and G. H., nor either of them

§ 272. having made any request to have such property divided,

• § 274. And it further appearing to this court that said E. F. does not reside in this State and has no agent therein, and that it is necessary that some person should be authorized to take possession and charge of the same, for the benefit of said E. F.,

§ 258. Now therefore it is hereby ordered, adjudged and decreed, that distribution of said estate be now made as follows:

1. That said sum of three thousand dollars be distributed equally between said C. D., E. F. and G. H., and that said executor pay to each the sum of one thousand dollars.

2. That said E. F. and G. H., being equally interested in the only remaining estate undisposed of, which is of the value of \$50,000, and the property devised and bequeathed to said C. D. having been necessarily sold for the payment of the debts and expenses of the estate, make contribution according to their respective interests to the said C. D., which is one half from each; that the sum to be contributed to said C. D. is the sum of \$8,333 33 1-3, which the said E. F. and G. H. are hereby decreed to pay to the said C. D., one half each.

§ 181.

3. That upon the payment of said sum by said E. F. and G. H. to said C. D., or in any other manner accounting to his satisfaction for the same, the said remaining portion of this estate, to wit, said rancho and the cattle thereon be distributed to and be decreed to be the property and estate of said E. F. and G. H.

§ 274. And it is further ordered that the said G. H. be appointed an agent to take possession and charge of said estate and property of said E. F., upon his giving a bond  
§ 275. to the judge of probate of this county, in the sum of \$5,000, to be approved by said judge, conditioned faithfully to manage and account for such estate,

And it is further ordered, that upon filing in this court the proofs of performance by said executor and by said devisees E. F. and G. H., as hereinabove ordered, this decree shall take full effect and be declared to be completed and final, and said executor shall be held to be discharged from further liability.

§ 279.

[Dated, etc.]

M. N., Probate Judge.

## NO. 176.

## DECREE OF DISTRIBUTION.

In the Matter of the Estate of George Perkins, Deceased.	}	In the Probate Court in and for the County of San Francisco, State of California.
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The administrator, Richard Perkins, having presented and filed on the 29th day of October, A. D., 1855, his final account and prayed for its settlement, and the said account, after due notice given, having come up for examination and settlement, and the same having been referred to Alexander Campbell, Esq., to examine and report thereon, and the referee having reported, that the account should be allowed as presented, and the said report having been on the 26th day of November, A. D., 1855, by an order of the court confirmed, and the said final account allowed and settled.

And the said administrator having prayed that upon the settlement of his account, an order should be granted, pursuant to the statute, for all persons interested in the estate to appear and show cause why a distribution of said estate, without partition, should not be made to the heirs of said estate, and the said administrator having represented and the said referee having reported that the heirs and only heirs of said estate were the said Richard Perkins, administrator as aforesaid, and his brother Abijah C. Perkins of Boston, in the Commonwealth of Massachusetts, and the said Richard Perkins having a full power of attorney from the said Abijah C. to represent him, the said Abijah, and in all matters connected with said estate to act for him as fully as he could do for himself if present, a copy of which power of attorney the said Richard has placed on file in this court.

And the court having on the 26th day of November, A. D. 1855, pursuant to said prayer of the administrator, ordered that all persons interested in the estate of George Perkins, deceased, late of Boston, in the Commonwealth of Massachusetts, and of China, be and appear in the city of San Francisco, at the court room, in the City Hall, of the Probate Court within and for the county of San Francisco, State of California, on the 31st day of December, A. D. 1855, at the opening of the court on that day, or as soon thereafter as counsel can be heard, to show cause if any they can why the estate of George Perkins should not be distributed without partition to his heirs, and to Richard Perkins and Abijah C. Perkins as such heirs; and the court having further ordered that a notice be published in the Daily Alta California, a daily newspaper of the city of San Francisco, for the space of four successive weeks, the last insertion being prior to the said 31st day of December, A. D. 1855, to all persons interested in the estate of George Perkins, deceased, late of Boston, Commonwealth of Massachusetts, and of China, to be and appear in the city of San Francisco, in the court room, in the City Hall, of the Probate Court within and for the county of San Francisco, State of California, on the 31st day of December, A. D. 1855, at the opening of the court on that day, or as soon thereafter as counsel can be heard, to show cause if any they have why the estate of George Perkins should not be distributed without partition to his heirs, and to Richard Perkins and Abijah C. Perkins according to the petition of Richard Perkins administrator, on file.

Now on this 31st day of December, 1855, the administrator having filed a copy of the said notice ordered to be published, with the affidavit of the printer of the Daily Alta California thereto attached, that the same has been published daily in said paper for the space of at least four successive weeks, the first insertion being on the twenty-seventh day of November, A. D. 1855, and the last on the twenty-seventh day of December, A. D. 1855, and it being satisfactorily proven to the court that George Perkins, deceased, died leaving neither father, nor mother, nor wife, nor sister, nor issue, nor children of a deceased sister, nor children of a deceased brother; that he died leaving only two brothers, viz: Abijah C. Perkins, of Boston, in the Commonwealth of Massachusetts, and Richard Perkins (of said Boston) now at San Francisco in the State of California, and it being made to appear that the said Abijah C. and Richard are the heirs and the only heirs of the estate of said George Perkins, deceased; and the said Richard Perkins appearing in court and for himself as well as for his brother Abijah C. agreeing thereto, and no one appearing in opposition,

It is ordered, that the prayer of Richard Perkins administrator, for the distribution of the estate of George Perkins, without partition to the said Richard Perkins and Abijah Perkins be and the same is hereby granted;

And it is therefore adjudged and decreed that the said Abijah C. Perkins, of Boston, in the Commonwealth of Massachusetts, and Richard Perkins (of the same

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place) now at San Francisco, State of California, be and they hereby are seized of and entitled to the lands, tenements and hereditaments in the State of California, and the appurtenances thereof as tenants in common thereof, in fee simple, holding share and share alike, belonging to the estate of George Perkins, deceased, late of said Boston and China, or to which he had any right, title, or interest, whether the same may stand in the name of said George Perkins or in the name of the said administrator, or be held in the names of others in trust for the said George Perkins, or his estate,

And it is further adjudged and decreed, that all moneys, all accounts, bills, promissory notes, and every evidence of indebtedness, together with all mortgages and securities of whatever nature, belonging to the estate of said George Perkins be and the same hereby are assigned, transferred, set over and delivered to said Abijah C. Perkins and Richard Perkins, in full ownership and property, share and share alike,

Any suits now pending in the name of the administrator may be prosecuted in his name with his consent, but at the proper cost of said Abijah C. and Richard.

Dated San Francisco, this thirty-first day of December, A. D. 1855.

T. W. FREELON, County Judge.

NO. 177.

PETITION FOR ORDER TO CONFIRM PARTITION MADE BY AGREEMENT,  
AND TO DIRECT ADMINISTRATOR TO MAKE PARTITION DEED.

State of California, }  
City and County of San Francisco. } In the Probate Court.

In the Matter of the Estate }  
of }  
Patrice Dillon, Deceased. }

To the Honorable the Probate Court of the City and County of San Francisco:

The petition of Francis Salmon, Michael Reese, Augustus J. Bowie, Mary E. Gwin, and her husband William M. Gwin, Gustave Touchard, Henry Mathey, Edward J. Pringle, S. M. Mezes, C. D. Poston and Abram W. Thompson for and assignee of the interest of D. S. Gregory, sheweth:

That heretofore, to wit: in the month of August, 1857, Patrice Dillon, the deceased aforesaid, and your petitioners were the owners as tenants in common, as set forth in their agreement hereafter written, of a certain tract of land or rancho, in the county of Sonoma, hereinafter more particularly described, and the said Patrice Dillon acting by his attorneys Gustave Touchard and A. C. Whitcomb, thereunto duly authorized by power of attorney, a copy of which is hereto annexed and made part hereof, made and executed together with your petitioners a certain contract or agreement in writing in the words and figures following:

Memorandum of an agreement entered into this day of August, 1857, between Gustave Touchard, Francis Salmon, Michael Reese, Aug. J. Bowie, Mary E. Gwin, Henry Mathey, Patrice Dillon, Edward J. Pringle, S. M. Mezes, C. D. Poston and D. S. Gregory:

Whereas, the aforesaid parties are, or claim to be the owners of the rancho situated in the county of Sonoma and State of California, and known as the rancho "Roblar de la Miseria," and described as follows:

[Here follows description of property.]

And whereas the aforesaid parties are or claim to be the owners as tenants in common of said ranch (except as hereinbefore excepted) in the proportions following, to wit:

Gustave Touchard,	four thirty-seconds,	(4-32).
Francis Salmon,	eight thirty-seconds,	(8-32).
Michael Reese,	four thirty-seconds,	(4-32).
Aug. J. Bowie,	four thirty-seconds,	(4-32).
Mary E. Gwin,	four thirty-seconds,	(4-32).
Henry Mathey,	one thirty-second,	(1-32).
Patrice Dillon,	three thirty-seconds,	(3-32).
Edward J. Pringle,	one thirty-second,	(1-32).
S. M. Mezes,	one thirty-second,	(1-32).
C. D. Poston,	one thirty-second,	(1-32).
D. S. Gregory,	one thirty-second,	(1-32).

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And whereas the said parties, tenants in common as aforesaid, desire to make an amicable partition of their said interest in said rancho,

Now this agreement witnesseth :

Article 1. Abram W. Thompson, surveyor, is hereby appointed a commissioner to make partition of said rancho, as follows :

Art. 2. The exterior limits of the entire rancho are to be considered for the purposes of this partition, as already ascertained by the survey heretofore made by the Surveyor General of the United States and approved by him.

Art. 3. The said A. W. Thompson shall take said survey as a guide and shall first separate from the main body of said rancho the half league herein before mentioned and described.

Art. 4. He shall then run up the remainder of said ranch into sections, half sections and quarter sections, as is done by the surveyors of the Government of the United States.

Art. 5. He shall then divide the said sections, half sections and quarter sections into thirty-two different lots, all of which shall be as nearly equal in value as may be and in which is to be considered quantity and quality of soil, hill and valley, proximity to embarcaderos, etc., etc.

Art. 6. Said commissioner shall then make and number the said lots from one to thirty-two, on a map to be made by him for that purpose.

Art. 7. After the said allotment shall be made and marked as aforesaid, the said commissioner by a notice in writing to be served personally on the parties hereto or his or their attorney or attorneys in fact, shall require the parties hereto to appear before him at a given day and hour, and at a given place in the city of San Francisco, to be designated in said notice, for the purpose of making a final partition of said interest in said rancho.

Art. 8. On the day and hour and at the place designated in said notice, provided all the parties hereto or their attorneys in fact shall have had at least five days written notice as aforesaid, the said commissioner shall proceed to make the said partition as follows : he shall number thirty-two pieces of paper from one (1) to thirty-two (32) inclusive, fold them so that the numbers cannot be seen and put them in a hat. The parties hereto in the order in which their names are set forth in this agreement shall then take each from said hat one, two, three, four or more of said pieces of paper containing said numbers according as he shall be entitled to one, two, three, four or more, thirty-seconds. The said commissioner shall then put into a hat, other thirty-two pieces of paper, to be numbered from one (1) to thirty-two (32) inclusive, and to be folded as aforesaid, which shall then be drawn from the hat by the parties hereto or his or their attorney or attorneys in fact, as the case may be, in the order which shall be ascertained by the first drawing.

Art. 9. The parties hereto shall be entitled to the lot or lots, as the case may be, on the map, the number or numbers of which shall correspond with the like number or numbers which shall be last drawn by each respectively.

Art. 10. As soon as the said drawing shall be made as aforesaid, the said commissioner shall set forth in a report to be by him attached to the said map, and to be made a part thereof, of the result of said drawing, which said report is to be signed and dated by him the said commissioner.

Art. 11. The parties hereto bind themselves immediately thereafter in person or by attorney to effectuate fully the said partition, by executing to each other the necessary deeds and releases.

Art. 12. The costs of this partition are to be paid by the parties hereto, in proportion to their interest, and it is hereby further agreed that the same shall be paid at the time of said partition, and if any one shall be in default the said commissioner is to look for payment to the defaulting party and not to the other parties hereto.

[Signed by the parties.]

Whereby and by means whereof the said Patrice Dillon became and was bound to your petitioners to make and suffer to be made partition of the said rancho according to the terms of said agreement, and to join with your petitioners in making conveyance of the several lots or portions thereof in severalty, according to the partition to be made as aforesaid between the said parties; And your petitioners further allege that the said Abram W. Thompson entered upon said rancho and made survey

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thereof and divided the same into sections and quarter sections and into thirty-two different lots or portions, as in and by said agreement required, and marked and numbered the said lots, and presented to parties signing said agreement the map of his said survey and division, marked and numbered as by said agreement required, and the same was by the said parties examined and approved, a copy of which map is hereto annexed and made part hereof; And the costs of said survey and division amounting to the sum of eight hundred dollars or thereabouts were paid by the said parties in proportion to their interest as aforesaid in said rancho; And afterwards and before the drawing of the lots and the final partition of said rancho, to wit: on or about the twelfth day of October, A. D. 1857, the said Patrice Dillon died, That after the issuance of letters of administration herein to Gustave Touchard, the said Abram W. Thompson, commissioner in said agreement named proceeded to make the drawing and allotment specified by said agreement; that due notice was given according to the terms of the said agreement to the said Gustave Touchard, administrator of the estate of said Dillon, and to your petitioners of the time and place of the said drawing and allotments, and on the fifteenth day of February, 1858, in the presence of the said Touchard, administrator aforesaid, and of your petitioners, the said commissioner made partition of the said rancho in the manner and form set forth and prescribed by the said agreement; And the several parties to the said agreement drew and became entitled to the subdivisions or allotments hereinafter set forth to each of them, viz:

Augustus J. Bowie,	}	to numbers nineteen (19), twenty-three (23), sixteen (16), and twenty-eight (28).
Patrice Dillon, by the drawing of Gustave Touchard, administrator,		to numbers twelve (12), seventeen (17), and four (4).
Edward J. Pringle,	}	to number thirty-two (32).
C. D. Poston,		to number eleven (11).
S. M. Mezes,	}	to number eighteen (18).
Mary E. Gwin,		to numbers twenty-five (25), thirty-one (31), fifteen (15), and five (5).
Francis Salmon,	}	to numbers twenty-four (24), twenty-two (22), six (6), twenty-nine (29), nine (9), two (2), eight (8), twenty-six (26).
Michael Reese,		to numbers seven (7), fourteen (14), thirteen (13), and thirty (30).
Gustave Touchard,	}	to numbers one (1), three (3), twenty-one (21), and twenty (20).
Abram Thompson for, and assignee of the interests of D. S. Gregory,		to number ten (10).
Henry Mathey,		to number twenty-seven (27).

As will appear by the certificate of the said commissioner hereto annexed, which said numbers are marked upon the map of the said commissioner and indicate the subdivisions or allotments to which the said parties are respectively entitled in severalty, whereby and by means of the premises the several parties to the said agreement have become entitled to hold in severalty their respective portions of the said Rancho, and are held and bound to make conveyances by deed according to the partition aforesaid, so that each may hold in severalty the portion to which he is entitled free and clear of the claims of the other parties; and your petitioners are ready and willing to join in a deed of partition as aforesaid, and are desirous that the said Touchard, administrator aforesaid, may be authorized and directed to join with them in a deed of partition to carry out the true meaning and effect of the above written agreement of the said Dillon. Wherefore, your petitioners pray that the said Gustave Touchard, administrator of the estate of the said Patrice Dillon, may be authorized and directed in consideration of the conveyance to him the said Touchard by your petitioners of all their estate and interest in subdivisions, numbers twelve, (12) seventeen (17) and four (4), aforesaid of the said rancho, to execute to your petitioners such deed of conveyance as shall release and convey to them respectively all his estate and interest, and all the estate of the said Dillon, at the time of his death, in and to the subdivisions to which they are respectively entitled as herein above set forth. And your petitioners will ever pray and so forth.

[Signed by the parties.]

[Here follows copy of the power of attorney of Patrice Dillon to Gustave Touchard.]



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In accordance with an article of agreement made and entered into by and between the joint owners of the estate in Sonoma county, State of California, known as the "Rancho Roblar de la Miseria," bearing date August, 1857, I have this day made the final drawing of the allotments or divisions thereof. The said joint owners having been duly notified, and being present in person or by proper representations; and all of the provisions of the said article of agreement fully and truly carried out. The result of this drawing I hereby certify to be as follows: the numbers here set down being drawn in reference to the numbers of the allotments shown upon the map, and field notes of the survey made by me of the said estate for this purpose in September and October, 1857.

Augustus J. Bowie,	}	Nos. nineteen, [19] twenty-three, [23.
Gustave Touchard, as administrator of		" sixteen [16] and twenty-eight, [28.]
the estate of Patrice Dillon.	}	Nos. twelve, [12] seventeen, [17] and
Edward J. Pringle,		four [4.]
C. D. Poston,	}	No. [32.] thirty-two
S. M. Mezes,		No. [11.] eleven.
Mrs. Mary E. Gwin,	}	No. [18.] eighteen.
		Nos. twenty-five [25.] thirty-one [31.]
	}	" fifteen [15.] and five, [5.]
Francis Salmon,		Nos. twenty-four [24.] twenty-two, [22.]
	}	" six [6.] twenty-nine, [29] nine, [9]
Michael Reese.		two [2.] eight [8.] twenty-six, [26.]
	}	Nos. [7] seven, [14] fourteen, [13] thir-
G. Touchard,		teen and thirty, [30.]
Abram W. Thompson, for and assignee of	}	Nos. [1.] three, [3] twenty-one, [21] and
the interest of D. S. Gregory, Henry		twenty, [20.]
Mathey.	}	No. [10] ten.
		No. twenty-seven, [27.]

San Francisco, February 15th, 1858.

A. W. THOMPSON, Surveyor and Commissioner.

## NO. 173.

### PETITION FOR A DECREE OF PARTITION. (§ 263.)

In the Matter of the Estate	}	Probate Court
of		City and County of San Francisco.
Antonio Hall, Deceased.	}	

To the Hon. the Probate Court of the City and County of San Francisco.

The petition of Oliver Hall, James Hall, and Noah Hall, respectfully sheweth: that by the decree of distribution of this Hon. Court, made herein on the 25th day of January, 1858, the estate, real and personal of the said Antonio Hall, deceased, was assigned to your petitioners and others, heirs at law of said deceased, the proportion or parts of each, being named therein respectively, according to their several rights of inheritance, but that said estate so assigned is in common and undivided, and the respective shares of said heirs are not separated and distinguished; Wherefore, your petitioners pray that partition and distribution of said property so assigned as aforesaid may be made, and that the respective shares of your petitioners and of each of them, and of such others of the heirs of said deceased as may desire, or of all of them, if the same be necessary, for the purposes of the application of these petitioners, may be separated and set off to them respectively, in the proportions and to the persons named in said decree as the heirs at law of said deceased, reference to which decree the same being on file in this court is made as a part of this petition; and that a day may be appointed for hearing this application, and that notice thereof may be given to all persons interested in said estate residing in the State of California, or their guardians, and to agents, attorneys or guardians, if there be any in this state, of such interested persons as reside out of the State, and that this court will direct whether such notice shall be given personally or by publication, and that some discreet person may be appointed to act as agent in this

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matter for such of said interested parties as reside out of this state who have no agents, attorney, or guardians in this state. And your petitioners will ever pray, etc. Sections  
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OLIVER HALL,  
JAMES HALL, and  
NOAH HALL.

By JOHN SATTERLEE, their attorney.

NO. 179.

ORDER APPOINTING DAY OF HEARING AND DIRECTING NOTICE TO BE GIVEN. (268.)

In the Matter of the Estate  
of  
Antonio Hall, Deceased. }

In Probate Court,  
City and County of San Francisco.

On reading and filing the petition of Oliver Hall and others, praying for a partition and distribution of the estate real and personal of said deceased to the respective parties entitled,

It is ordered, that the hearing of said application be appointed for Monday, the eighth day of March, 1858, at 11 o'clock, A. M., of that day, at the court room of this court, at the City Hall, in the city and county of San Francisco, and that notice thereof be given personally to each of said parties named in said decree, as heirs of said deceased, or to their guardians who may reside in this State, if they can be found, or to the agents, attorneys, or guardians, if any there be in this State of such as reside out of the State, by serving them with a copy of this order at least ten days before the said day of hearing, and that notice be given to all such interested persons as cannot be personally served by publishing a copy of this order at least twice a week for four weeks successively next before said day appointed for the hearing of said application. § 268.

T. W. FREELON, County Judge.

San Francisco, February 1st, 1858.

NO. 180.

ORDER APPOINTING AGENT FOR PARTIES OUT OF THE STATE. (270.)

Application having been made herein by Oliver Hall and others for a partition and distribution of the respective shares of the estate of said deceased to the heirs at law, and the hearing of said application having been appointed for the 8th day of February next, and notice of such hearing being ordered to be given to all parties interested,

It is hereby ordered, that William B. Fleming be appointed to act as agent for such of said interested parties as may reside out of this State, in the matter of such partition and distribution. § 270.

T. W. FREELON, County Judge.

February 1st, 1858.

NO. 181.

APPOINTMENT OF COMMISSIONERS TO MAKE PARTITION. (§ 261.)

In the Matter of the Estate  
of  
Antonio Hall, Deceased. }

In Probate Court,  
City and County of San Francisco.

The application of Oliver Hall, James Hall and Noah Hall for a partition and distribution of the property of this estate, assigned to the heirs of said deceased, this day, coming on to be heard, in accordance with the order of this court, duly made on the 1st day of February, 1858, and due notice of this application having been given as directed by said order, and proof thereof to the satisfaction of this court being filed, and all the heirs of said deceased as named in the decree of the 25th day of January, 1858, assigning said property, appearing either in person or by attorney, agent, or guardian, or by assignee, and assenting, § 268.  
§ 263.

It is hereby ordered, that the application be granted and that such partition and distribution be made, and Elijah Dewey, R. H. Sinton and Henry Baker are hereby appointed commissioners for that purpose, and whose duty it shall be to make division of the real estate not only in the city and county of San Francisco, but also, wherever situated within this state.

T. W. FREELON, Probate Judge.

San Francisco, March 8, 1858.

### NO. 182.

#### WARRANT TO COMMISSIONERS ON PARTITION. (§ 261.)

In the Matter of the Estate of Antonio Hall, Deceased.	}	In the Probate Court, of the City and County of San Francisco.
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To Elijah Dewey, R. H. Sinton and Henry Baker, duly appointed commissioners in the above matter by the order of this court of this date.

You are hereby authorized and directed to proceed without delay and make full and complete partition and distribution of the estate of Antonio Hall, deceased, among the heirs of said deceased, in accordance with the decree of distribution of this court made on the 25th day of January, 1858, a duly authenticated copy whereof is annexed, and make report thereof to this court in writing, with all convenient speed; and you are hereby notified, that William B. Fleming, of the city and county of San Francisco, has been appointed by this court to act as agent for any of the parties interested who may reside out of the state.

And for information of advancements by the deceased to any of said heirs, as determined by this court, your attention is further called to the said decree of this court, of which a copy is attached hereto as a part of this warrant.

Witness, the Hon. T. W. Freelon, Judge of the probate court of the city and [SEAL.] county of San Francisco, March 8th, 1858.

Attest: WILLIAM DUER, Clerk,  
By JOHN HANNA, Deputy.

State of California, City and County of San Francisco: ss.

We, Elijah Dewey, R. H. Sinton and Henry Baker, and each of us, do solemnly swear that we will faithfully discharge the duties of Commissioners to make partition and distribution of the estate of Antonio Hall, deceased, according to the best of our knowledge and ability.

Sworn before me, this 10th day of March, 1858.

W. BARTLETT, Deputy Clerk.

ELIJAH DEWEY,  
R. H. SINTON,  
HENRY BAKER.

### NO. 183.

#### REPORT OF COMMISSIONERS ON PARTITION. (§ 271.)

In the Matter of the Estate of Antonio Hall, Deceased.	}	In the Probate Court City and County of San Francisco,
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To the Hon. the Probate Court of the City and County of San Francisco.

The undersigned, duly appointed by this Hon. Court, Commissioners, to make partition and distribution of the estate real and personal, of Antonio Hall, deceased, respectfully report,

That they have performed services as such commissioners under the warrant issued to them by this court as follows:

Before proceeding to make distribution, they caused full and accurate surveys to be made of all the real estate belonging to the said estate of Antonio Hall, deceased, as hereinafter stated, copies of which surveys, with the field notes, descriptions, and accompanying maps are annexed hereto, and made a part of this report.

That they also examined and inspected all the personal estate which is the subject of distribution, and they return annexed hereto as schedule A, a full and complete list of all said personal property.

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§ 270.

That thereupon, due notice in writing was given by your commissioners, to all the parties in interest, or their proper and lawful agents, attorneys, guardians or representatives, a copy of which notice, together with the proofs of service thereof, is also annexed hereto and filed herewith, notifying said parties that the commissioners would proceed at the time and place therein named to make partition and distribution of said estate.

§ 264.

That at the said time and place, your commissioners met and were attended by the said parties interested, to wit: the heirs of said deceased as named in said decree of this court of January 25th, as follows: Oliver Hall, James Hall, Noah Hall.

§ 261.

I, Lawrence Pool, assignee of Henry L. Hall, Mary Hall, and Charles Hall, in person; Ellen L. Hall and Chauncey B. Hall, minors, by Oliver Hall, their duly appointed guardian; Emma Hall Johnson, by R. C. Johnson, her husband; Thomas R. Blake and Samuel Blake, by Nathaniel S. Pettit, their attorney in fact; Catharine C. Bates, and Andrew C. Bates, by Chas. G. Bryant, their guardian; Maria Thorp and Matilda H. Thorp, residing out of this state, by W. B. Fleming, Esq., duly appointed by your Honorable Court as agent of such parties as reside out of this state.

That your commissioners thereupon, and after a full hearing of all the parties interested, and after due consideration, and in view of their instructions as expressed in said warrant, and the said decree of your Honorable Court of January 25th, 1858, proceeded to make partition and distribution.

§ 278.

That by the terms of said decree, it appears, that there are in all, fifteen heirs, the descendants of said deceased, of whom nine stand in the first degree, and six in

§ 319

to § 328.

the second. That one of said heirs, in the first degree, Charles Hall, has received advancements from the deceased in his lifetime, of personal estate, which have not been included in the administration, and amount to what would have been his distributive share of the personal property of said estate at this time, and he is therefore excluded by said decree from receiving any further portion of said personal property upon this distribution; that therefore, each of said eight heirs being of equal degree, are entitled to (1-11th) one eleventh of said personal property, and the remaining six heirs taking by right of representation, and being in equal degree, are entitled to (1-22) one twenty-second, each.

§ 325.

That your commissioners therefore divided and set off in the following manner

#### THE PERSONAL ESTATE.

§ 265.

To Oliver Hall and James Hall, entitled to 1-11th each, who agreed with themselves to take the same in common, a certain mill (describe it) with the lease thereof, etc. etc., valued at

\$10,000

§ 264.

To Noah Hall and I. Lawrence Pool, assignee of Henry L. Hall, entitled to 1-11th each, the stock in trade of deceased at, etc., (describe it) valued at

\$10,000

To Mary Hall and to Chauncey B. Hall and Ellen L. Hall, represented by Oliver Hall, their guardian, and Emma Hall Johnson, represented by R. C. Johnson, her husband, entitled to 1-11th each, the horses, cattle and other property, upon the rancho, etc. etc., and certain mining claims (describe them) valued at

\$20,000

To Thomas R. Blake and Samuel Blake, represented by their attorney in fact, N. S. Pettit, entitled to 1-22 each, a certain schooner (describe) valued at

\$5,000

To Catharine C. Bates and Andrew C. Bates, represented by Charles G. Bryant, their guardian, entitled to 1-22 each, two certain mortgages (describe them) of \$2,500 each,

\$5,000

To Maria Thorp, residing out of this State and represented by W. B. Fleming, agent, etc., entitled to 1-22, certain state bonds (describe them) valued at

\$2,500

To Matilda H. Thorp, residing out of this State and represented as the foregoing, entitled to 1-22, certain county warrants (describe them) valued at

\$2,500

Making in all, the sum of \$55,000; that being the whole amount of the personal estate of said deceased, except the sum of \$1,372 25, in cash, which the administrators retain to meet the expenses of administration, subject to the order and direction of the court.

#### REAL ESTATE.

Your commissioners would further report in relation to the real estate, That a certain lot in the city of Marysville, described as follows: (description)

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being of but little value, and not admitting, in the judgment of your commissioners, of being fairly divided, or of being set off in whole to any of the said distributees to make a fair proportion with the rest, they recommend that the same be sold, and that the cash proceeds be distributed among the said heirs in their respective proportions.

1st. A tract of agricultural land in the county of Colusi [describe it], being part of the rancho known by the name of Cassay.

That said stock farm or rancho is unique and complete as a whole, being a small valley or hollow, having proper proportions of pasture land and sowing land, with water, surrounded by hills, and not admitting of division without injury to the same. § 267.

That said first named tract of land, to wit, the Cassay rancho, was held in common and undivided between said deceased and one John Bidwell, and in order to effect the purposes of this commission your commissioners by agreement with said John Bidwell made partition thereof, said Bidwell taking the northern half of the tract, and leaving the southern half as the property of this estate ; which said agreement, together with the survey maps, field notes, etc., are filed herewith, subject to the approval of this court.

That the above matters being submitted to said parties, the said heirs and their representatives, and by them fully understood and considered, your commissioners proceeded to make partition of said estate, and allotted and set off the same in manner and form following :

1st. The said tract of land above described as a stock or grazing farm, being incapable of division without injury to the same, and being of greater value than the share of any one party, and the said Oliver Hall being the oldest male heir of those in the first degree, agreeing to accept the same and to pay to the other parties interested their just proportion of the true value thereof, and the same being ascertained to be of the value of \$10,000, your commissioners agreed to assign the same to the said Oliver Hall, he paying or securing to be paid to the said interested parties the following amounts :

To James Hall, Noah Hall, I. Pool, assignee of Henry L. Hall, Mary Hall, Chauncey B. Hall, Ellen L. Hall, Emma Hall Johnson and Charles Hall the sum of \$800 each, and to the remaining heirs the sum of \$400 each, which your commissioners award to them as their just proportion, considered together with the partition of the tract of land in Colusi county, as hereinafter mentioned.

2d. That said tract of land in Colusi county, so partitioned as aforesaid, by agreement with John Bidwell, and containing ten thousand five hundred and thirty-five acres was duly surveyed and divided into fourteen small tracts and designated respectively, A, B, C, D, E, F, G, H, I, K, L, M, N and O,

And your commissioners proceeded to allot and set off the same to said several parties as hereinafter mentioned.

The whole value of said tract of land being estimated at \$14,000, and the value of said grazing farm in Monterey county \$10,000, would make a total of \$24,000.

Of this amount the share or proportion of each of the nine parties in the first degree would be \$2,000, and of the remaining six \$1,000 each.

The said Monterey tract, at a valuation of \$10,000, being taken by said Oliver Hall, leaves the sum of \$8,000 in money to be paid by said Oliver Hall to the remaining parties, which as shown above, gives the sum of \$800 to each party in the 1st degree, and \$400 to each party in the 2d degree, and upon the division of the remaining tract of land, each party of the first degree would be entitled to an amount of land equal in value to \$1,200, and each party of the second degree to an amount equal to the sum of \$600.

§ 265.  
Your commissioners therefore, in making said division of said fourteen smaller tracts, endeavored so to estimate and divide the same, with reference to location, quantity, quality and all other advantages and disadvantages, as to make eight divisions of the value of \$1,200 each, and six divisions of the value of \$600 each.

Your commissioners proceeded therefore to make the allotment of said divisions indicated upon said map as above stated, by two separate drawings in the presence of said parties, one among those of the first degree, for the eight larger divisions, of the value of \$1,200 each, and one among those of the second degree for the six smaller divisions. which resulted as follows :

James Hall, drew	-	-	-	-	-	-	D.
Noah Hall "	-	-	-	-	-	-	K.
Etc., etc.,	-	-	-	-	-	-	etc.

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§ 265.

And your commissioners do accordingly so apportion, allot and set off to the said several parties interested.

Your commissioners therefore report the foregoing summary of their proceedings, and respectfully submit the same for the consideration of your Honor.

San Francisco, June 7th, 1858.

ELIJAH DEWEY,  
R. H. SINTON,  
HENRY BAKER,  
Commissioners.

## NO. 184.

## ORDER OF FINAL DISTRIBUTION. (§ 258.)

In the Matter of the Estate }  
of } In Probate Court.  
Herman R. Haste, deceased. }

State of California, City and County of San Francisco.

On reading the report of John A. Lent, Robert C. Rogers, and Denis Lyons, Commissioners appointed by the Probate Court of San Francisco county, to make division and distribution of the real and personal property of Herman R. Haste, deceased, among the widow, and heirs of said deceased; and it appearing by the said report that the real estate of said deceased, cannot all, well be divided, and a sale of a part of the same is recommended.

It is by the court ordered and decreed, that the one half interest of the estate of said deceased in the house and lot in Sacramento street, more particularly described hereinafter, and of which the said deceased was an owner in common, with one Daniel S. Chapin, by conveyance from Henry G. Gordon and Arthur O. Gay, dated August 30th, A. D. 1850, be, and the same is hereby set off and awarded to Mrs. Eliza Haste, widow of said Herman R. Haste, deceased, at the appraisement or valuation of the sum of two thousand five hundred dollars, for the said moiety or one half. The whole of said lot is situate, bounded and described as follows to wit:

[Here follows description of property.]

And also, it is further ordered and decreed, that John Haste, administrator, and Eliza Haste, administratrix of the estate of said Herman R. Haste, deceased, cause to be sold at public auction, for cash, to the highest bidder, the fifty vara lot No. 996, situate corner of Geary and Taylor streets, and also the fifty vara lot No. 1263, situate corner of Hyde and Ellis streets, in the city of San Francisco, and that the proceeds of such sales, together with the sum of two thousand nine hundred and ten 83-100 dollars, money, shown by the report of said commissioners to be in the hands of the administrators and administratrix, shall, after paying the costs of such sale, the expenses of administration and fees of the commissioners, and all other necessary costs and charges, be divided between the said Eliza Haste, widow, and Herman R. Haste, Junior, and Julia J. Haste, minor children and heirs of Herman R. Haste, deceased, in such a manner that the said Eliza Haste, widow, etc., shall receive a sum, that in connection with the appraised value of the interest in the house and lot in Sacramento street, will amount to one third of the whole estate, and the said Herman R. Haste, Junior, and Julie J. Haste, minors, be the sum of money, equal to two thirds of the whole estate of said deceased.

T. W. FREELON, County Judge.

Dated, September 28, 1854.

## NO. 185.

ORDER OF SETTLEMENT OF ESTATE AND DISCHARGE OF EXECUTOR.  
(§ 279.)

In the Matter of the last Will and Testament } In the Probate Court of the  
of } City and County of San Francisco,  
Elizabeth Sullivan, Deceased. } State of California.

An order having been made, to wit, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and fifty-five, directing distribution

of the assets of the estate of Elizabeth Sullivan deceased, among the legatees and devisees named in the will of said deceased, and the persons entitled thereto, as shown by and set forth in said order; and it being now at this day shown, that Eugene L. Sullivan, the executor of said last will and testament, has fully and faithfully discharged the duties of his trust, and has filed proper and full vouchers with the clerk of this court, showing a strict compliance with the terms of said order, and that he has distributed the whole of said estate then remaining in his hands, as thereby directed, and that no other assets have since come to his possession or knowledge, belonging thereto.

On motion of Messrs. Saunders & Hepburn, of counsel for said executor,

It is by the court ordered, adjudged and decreed, and the court does hereby order, adjudge and decree that the said Eugene L. Sullivan, executor of the said last will and testament, has fully and faithfully discharged the duties of his trust, as shown by his final accounts now on file, and has, as shown by the vouchers on file, fully complied with the order hereinbefore referred to, making distribution of said estate: and he the said Eugene L. Sullivan is hereby wholly and absolutely discharged from all further duties and responsibilities as such executor; and the said estate declared fully distributed and the trust settled and closed.

T. W. FREELON, County Judge.

San Francisco, June 9th, 1866.

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## FORMS UNDER GUARDIAN ACT.

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### NO. 186.

#### PETITION FOR APPOINTMENT OF GUARDIAN. (§ 336 and 378.)

To the Hon. Thomas W. Freelon, Probate Judge for the county of San Francisco.

Your petitioner, Montgomery Blair, respectfully represents, that Catharine A. Young, Mary A. Young and Albert Young, infant children of Alexander H. Young, and his deceased wife, Serena Young, are entitled to certain real estate situate in the counties of San Francisco, Alameda and Santa Cruz, in the state of California, and that said infants are all under the age of fourteen years, and reside in the District of Columbia, and are not now, and never were residents of the State of California. Your petitioner further states that the said Alexander H. Young, the father of said infants, also resides in the District of Columbia, and is jointly interested with his said children as tenant in common of the property aforesaid; and has authorized your petitioner by letter of attorney, duly signed and delivered, to take such steps as may be necessary to protect the interests of his said children in the property aforesaid. Your petitioner further represents that in his opinion, it is important to the interests of said infants that a guardian be appointed for them by this honorable court, to take charge of the said estate, and protect their rights in the same. Wherefore, as the friend of said infants, thereunto duly authorized by their father, your petitioner prays your honor to appoint a guardian for them and respectfully suggests the name of Lloyd Tevis, as a fit and proper person for said trust.

M. BLAIR.

[Sworn to, as in No. 85.]

## APPENDIX.

## NO. 187.

## PETITION FOR APPOINTMENT OF GUARDIAN. (§ 836.)

To the Hon. T. W. Freelon, County Judge, having charge of the probate business in the county of San Francisco :

Your petitioner, Maria J. Slack, a resident of San Francisco, respectfully represents, that Kate Agnes Kline, is her daughter, aged four years next July, and has some property, consisting of a house and lot in Sacramento city, worth about seven hundred and fifty dollars, which needs some care and attention, which cannot be bestowed without a legal guardianship. She therefore prays that she may be appointed guardian of her said child, Kate Agnes Kline, and have care and control of the property and custody of her person. And as, etc.

MARIA J. SLACK.

State of California, City and County of San Francisco.

Maria J. Slack, being duly sworn says, that she has read the foregoing petition and knows the contents thereof, that the same is true of her own knowledge.

MARIA J. SLACK.

Subscribed and sworn before me, this 20th of March, 1858.

D. P. BELKNAP, Deputy County Clerk.

## NO. 188.

## ORDER APPOINTING GUARDIAN. (§ 836.)

In the Matter of the Estate and Guardianship of Kate Agnes Kline, minor.	} In Probate Court. City and County of San Francisco.
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On reading and filing the petition, duly verified, of Maria J. Slack, praying to be appointed guardian of Kate Agnes Kline, a minor, on motion of D. O. Shattuck, Esq., attorney for the petitioner,

It is ordered, that Maria J. Slack be and she is hereby appointed guardian of the person and estate of the said Kate Agnes Kline upon executing and filing a bond to the said minor in the sum of five hundred dollars, conditioned according to law with sufficient sureties and approved by the judge of this court.

T. W. FREELON,  
County Judge and *ex-officio* Judge of the Probate Court.

## NO. 189.

## LETTERS OF GUARDIANSHIP.

State of California, County of San Francisco.	} In Probate Court,
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Maria J. Slack is hereby appointed guardian of the person and estate of Kate Agnes Kline, a minor.

Witness, William Duer, Clerk of the Probate Court of the county of San Francisco, with the seal of said court affixed, this 23d day of March, A. D. 1858.

By order of the Court: WILLIAM DUER, Clerk.

State of California, City and County of San Francisco, ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, that I will faithfully discharge the duties of guardian of the person and estate of Kate Agnes Kline, a minor, according to law.

MARIA J. SLACK.

Sworn and subscribed to before me, this 23d day of March, A. D., 1858.

D. P. BELKNAP, Deputy County Clerk.



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## NO. 190.

### GUARDIAN'S BOND. (§ 843, 76, 375.)

Know all men by these presents, that we, Maria J. Slack, William Vosburgh and S. A. Presho, are held and firmly bound unto Kate Agnes Kline, a minor, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Kate Agnes Kline, minor, for which payment well and truly to be made, we bind ourselves, our executors administrators and assigns, jointly and severally and firmly by these presents.

Sealed with our seals and dated this twenty-second day of March, 1858.

The condition of the above obligation is such that, Whereas application has been made to the Judge of the Probate Court of the city and county of San Francisco, State of California, for the appointment of Maria J. Slack guardian of the person and estate of the said Kate Agnes Kline,

Now therefore, if the said Maria J. Slack be appointed such guardian, and shall faithfully perform the duties of her trust according to law, and shall :

- 1st. Make a true inventory of all the estate, real and personal, of her said ward that shall come to her possession or knowledge; and shall return the same within such time as the said judge shall order.
- 2d. Shall dispose of and manage all such estate according to law and for the best interest of said ward and faithfully discharge her trust in relation thereto; and also in relation to the care, custody and education of said ward.
- 3d. Shall render an account on oath of the property, estate and moneys of said ward in her hands; and all proceeds or interest derived therefrom, and of the management and disposition of the same within one year after her appointment, and at such other times as the court shall direct; and
- 4th. At the expiration of her trust shall settle her accounts with the probate judge or with the said ward if she be of full age, or her legal representatives; and shall pay over and deliver all the estate, moneys and effects remaining in her hands, or due from her on such settlement to the person or persons who shall be lawfully entitled thereto.

Then this obligation shall be void and of no effect, else to remain of full force and virtue.

Sealed and delivered in the presence of }  
D. P. BELKNAP.

M. J. SLACK, [Seal.]  
WILLIAM VOSBURGH, [Seal.]  
S. A. PRESNO. [Seal.]

State of California, City and County of San Francisco, ss.

William Vosburgh and S. A. Presho, being duly sworn each for himself says that he is a freeholder resident in said State, and is worth the said sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

WILLIAM VOSBURGH,  
S. A. PRESNO.

Sworn to before me, this 22d day of March, 1858.

D. P. BELKNAP, Deputy Clerk of the Probate Court.

## NO. 191.

### ORDER APPOINTING GUARDIAN. (§ 336.)

In the Matter of the Guardianship }  
of  
John and George Martin, minor }  
children of Michael and Eliza- }  
deth Martin. }

In the Probate Court  
of the County of San Francisco and  
State of California.

On reading the petition of John Francis Liberia, praying to be appointed guardian of the persons and estates of John Martin and George Martin, minors, under the age of fourteen years, children of Michael and Elizabeth Martin, both of whom are deceased; it appearing to the court that the said minors have no relatives residing in this State, and that it is necessary for their support and protection of their property,

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that some suitable person should be appointed to take charge of them, after due consideration,

It is by the court ordered and decreed, that the petitioner, John Francis Liberia, be appointed guardian of the persons and estates of said minors, John and George Martin, on his filing an approved bond in the sum of one thousand dollars to each of said minors.

T. W. FREELON, County Judge.

San Francisco, May, 1856.

## NO. 192.

## ORDER APPOINTING GUARDIAN. (§ 386.)

In the Matter of the Guardianship }  
of } In Probate Court.  
Shasta, an Indian girl, a minor. }

On reading the petition of O. M. Wozencraft, praying to be appointed guardian of the person and estate of an Indian girl called "Shasta," a minor, under the age of fourteen years.

It appearing to the court that said minor is an orphan, that the petitioner is a suitable person to be appointed guardian,

It is ordered, that letters of guardianship of the person and estate of said minor, called "Shasta," be issued to the said applicant, Oliver M. Wozencraft, on his filing a bond in the sum of one hundred dollars.

San Francisco, July 27th, 1857.

## NO. 193.

## ORDER FOR NOTICE TO MINOR TO NOMINATE GUARDIAN. (§ 337.)

In the Matter of the last Will and Testament }  
of } In Probate Court.  
John Cotter, deceased. }

It is ordered, that notice be given to Edward B. Cotter, a minor heir of John Cotter, deceased, now resident in the city of San Francisco, to appear in this court, on Monday, the 29th day of June, A. D., 1857, at 11 o'clock, A. M., then and there to nominate a guardian of his person and estate, as prayed for by the executors of the last will and testament of John Cotter, deceased.

San Francisco, May 25, 1857.

## NO. 194.

## PETITION FOR APPOINTMENT OF GUARDIAN OF INSANE PERSON. (§ 347.)

To the Hon. Thomas W. Freelon, County Judge and Judge of the Probate Court of the County of San Francisco.

The petition of Mary Ann Denny, of the city of San Francisco, respectfully sheweth,

That she is the sister of Mary Champlain, whose maiden name was Sarah Twist, and who is at present at the residence of Mrs. Eagle, near Pacific street, in the said city of San Francisco.

That the said Sarah Champlain is the owner and possessed or entitled to the possession of certain property; that she is insane and mentally incompetent to manage her property.

Wherefore, your petitioner prays that such proceedings may be had and taken in the premises, as may be necessary for the appointment of a guardian of the person and estate of the said Sarah Champlain, and that such guardian be appointed.

MARY ANN DENNY.

[Sworn to as in No. 35.]

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## NO. 195.

### ORDER THAT INSANE PERSON BE NOTIFIED AND BE PRODUCED BEFORE PROBATE JUDGE. (§ 347.)

In the Matter of the Insanity }  
of  
Sarah Champlain. }

On reading the foregoing petition, it is ordered, that the above matter come up for a hearing before me at the county court room, or at my chambers, in the city hall of the city of San Francisco, on the 27th day of October, A. D. 1856, at 11 o'clock, A. M., of that day, and that notice be given to the said Sarah Champlain of the time and place of hearing the case, not less than five days before the time so appointed.

And that the said Sarah Champlain, if able to attend, be produced before me on the hearing.

T. W. FREELOS, County Judge.

San Francisco, October 22d, 1856.

## NO. 196.

### ORDER APPOINTING GUARDIAN OF AN INSANE PERSON. (§ 348.)

In the Matter of the Guardianship }  
of } Probate Court of said county.  
Morris Saxe, charged with insanity. }

State of California, City and County of San Francisco, ss.

Having heretofore, upon the petition of Charles Bain, representing that the above named Morris Saxe, is insane and mentally incompetent to manage his property, and praying for the appointment of a guardian of the person and estate of the said Morris Saxe, caused a notice to be given to the said Morris Saxe of the time and place of hearing the case, not less than five days before the time so appointed; and on reading and filing proof of due personal service of said notice upon said Morris Saxe. After a full hearing and examination upon such petition, it appearing to the probate judge that the said Morris Saxe, is insane and incapable of taking care of himself and managing his property, It is ordered, that James R. Jones of said city and county, who is hereby required to execute to the said Morris Saxe, a bond, according to the statute in such case made and provided, with sufficient sureties, to be approved by said probate judge, in the sum of sixteen hundred dollars, be, and he is hereby appointed guardian of the person and estate of Morris Saxe, above named, upon giving such bond.

T. W. FREELOS, County Judge.

Dated, San Francisco, January 5th, A. D., 1857.

## NO. 197.

### PETITION FOR ORDER OF SALE OF REAL ESTATE BY GUARDIAN. (§ 355 to 368.)

In the Matter of the Estate and Guardianship }  
of } In the Probate Court,  
Alonzo Field, a minor. } City and County of San Francisco.

The petition of Thomas Cole, Junior, guardian of the above named minor, respectfully sheweth to this court,

That the estate of said minor, consists almost wholly of real estate, the most of which is unproductive, and yields little or no income for the maintenance and education of said minor.

§ 359.  
§ 255.

That said real estate consists, etc. etc.,

[Here follows description of property.]

And by selling the same, a sufficient sum could be realized to make an investment that would furnish a sufficient income for the purposes above mentioned.

Sections

- That said minor has no other means of maintenance and education, and it becomes necessary therefor to make a sale of some part of said real estate.
- § 256. Your petitioner would further represent that said land being wholly unproductive, it would be greatly for the benefit of said minor if the whole were sold, and the proceeds, after providing for the wants of the minor as above stated, be invested in some safe securities from which an accruing interest and profit could be derived.
- § 360. Wherefore, your petitioner prays, that an order may be made, directed to the next of kin of the said minor, and to persons interested in the estate, to be and appear before this court, at such time as the court may appoint, to show cause why an order should not be granted for the sale of said real estate; and that upon such hearing, this Hon. Court may order said land or such part thereof as may be for the best interest of said minor, be sold for the purposes above mentioned.
- § 359. And your petitioner will ever pray, etc.

THOMAS COLE, Jr.

- § 359. [Sworn to as in No. 35.]

NO. 198.

ORDER TO SHOW CAUSE AND TO MAKE PUBLICATION. (§ 360, 361.)

[Title of Estate and Court as in the foregoing.]

On reading and filing the petition of Thomas Cole, Jr., praying for a sale of real estate, and it appearing therefrom, that a sale of the whole or of some portion of the real estate of said minor would be for his benefit, and is necessary,

- It is hereby ordered, that the next of kin of said minor, and all persons interested in said estate appear before this court, at the court room thereof, at the city hall, in the city and county of San Francisco, on Monday, the 7th day of June, 1858, at 11 o'clock, A. M., then and there to show cause why an order should not be granted for the sale of such real estate, and let a copy of this order be published twice a week for three weeks successively, before the said day appointed, in the "Daily San Francisco Times," a newspaper printed and published in said city and county of San Francisco.
- § 360.
- § 361.

M. C. BLAKE, Probate Judge.

May 3d, 1858.

NO. 199.

ORDER OF SALE OF REAL ESTATE. (§ 365.)

In the Matter of the Estate and Guardianship of Henry L. Moore and Maria Moore, minors.	}	Probate Court City and County of San Francisco.
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Benjamin Bewster, guardian of the above named minors, having heretofore presented to the Probate Court of the city and county of San Francisco, his petition for authority to sell the real estate in the State of California in which said minors are interested, for the immediate relief of said minors, they being in poor and needy circumstances and without the means of maintenance and education, and said real estate being in litigation; And the said probate court having upon such petition made an order directing the next of kin of said minors and all persons interested in said estate, to appear before said probate court, at the court room thereof at the City Hall in the city and county of San Francisco, on Monday, the 21st day of June, 1858, at 11 o'clock, A. M., then and there to show cause why an order should not be granted for the sale of said real estate; Now on this 21st day of June, 1858, on reading and filing satisfactory proof by affidavit, of the publication of said order, and the said guardian, Benjamin Brewster, having appeared by his attorney, E. D. Sawyer, and the proper proceedings having been thereupon had (no one appearing to oppose the application) and the probate court upon due examination being satisfied after a full hearing upon the said petition, that a sale of the whole of the property mentioned in the said petition is necessary to be made for the maintenance and support of said minors,

It is ordered by the court, that the said Benjamin Brewster, guardian as afore-

said, do sell the right, title and interest of said minors of, in and to the following described real estate, for the support and maintenance of said minors, that is to say:

[Here follows description of property.]

And it is further ordered, that the said sale be made at public auction, according to law, and that it be made for cash, and that the said guardian do make return of said sale to this court, according to law.

M. C. BLAKE, Probate Judge.

NO. 200.

ORDER ALLOWING GUARDIAN'S ACCOUNT. (§ 370, 382.)

In the Matter of the Estate and Guardianship of Mary Evelina Brunell, an infant,	}	In the Probate Court of the County of San Francisco.
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On reading and filing the account of Orson A. Reynolds, guardian of Mary Evelina Brunell, an infant, filed in this court the twenty-third day of October, A. D. eighteen hundred and fifty six; and also on filing the vouchers appertaining thereto; and also on filing the notice required by law to be given of the settlement of said account with due proof of publication or posting as required by law; and the matter of said accounting coming on to be heard on the third day of October, A. D. eighteen hundred and fifty-six, and no one appearing to oppose; and the said account and vouchers having been duly examined by this court and found to be correct, and reasonable for the interests of said infant;

And on motion of Messrs. Jones, Doyle, Barber & Boyd, of counsel for said guardian,

It is ordered that the said account of the said Orson A. Reynolds, guardian of the said infant, be and the same is hereby passed, approved and allowed, as tendered by him;

And it is hereby further ordered that the said guardian be allowed the commissions charged by him in said account, as and for his compensation.

Dated San Francisco, November 10th, 1858.

T. W. FREELOH, Probate Judge.

NO. 201.

BOND BY GUARDIAN ON THE SALE OF REAL ESTATE. (§ 366, 375, 73, 76.)

Know all men by these presents, that we, Charles Lumbard, principal, and William A. Yates and Thomas Cole, Jr., sureties, are held and firmly bound to the Probate Judge of the city and county of San Francisco, in the sum of five thousand dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 30th day of June, 1858.

The condition of the above obligation is such, that whereas an order has been made by the Probate Court of the city and county of San Francisco, authorizing the above named principal, as guardian of the person and estate of Sarah Morey, a minor, to sell certain real estate, the property of said minor, and bond in the sum above named has been ordered.

Now therefore, if the said Charles Lumbard, as such guardian, shall sell the said real estate in the manner prescribed by law for sales of real estate by executors and administrators, and shall account for and dispose of the proceeds of the sale or sales thereof in the manner provided by law, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in presence of  
TEMPLE EMMETT,

}

CHARLES LUMBARD,	[Seal.]
WILLIAM A. YATES,	[Seal.]
THOMAS COLE, JR.	[Seal.]

Sections

State of California, City and County of San Francisco, ss.

Thomas Cole, Jr. and William A. Yates being duly sworn each for himself says that he is a freeholder resident in this State, and is worth the said sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution. .

Sworn to before me this 30th day of June, 1858. }  
D. P. BELKNAP, }  
Deputy Clerk of the Probate Court. }

WILLIAM A. YATES,  
THOMAS COLE, JR.,

[Indorsed.]

The within bond and sureties, approved by me this 30th day of June, 1858.

M. C. BLAKE, Probate Judge.

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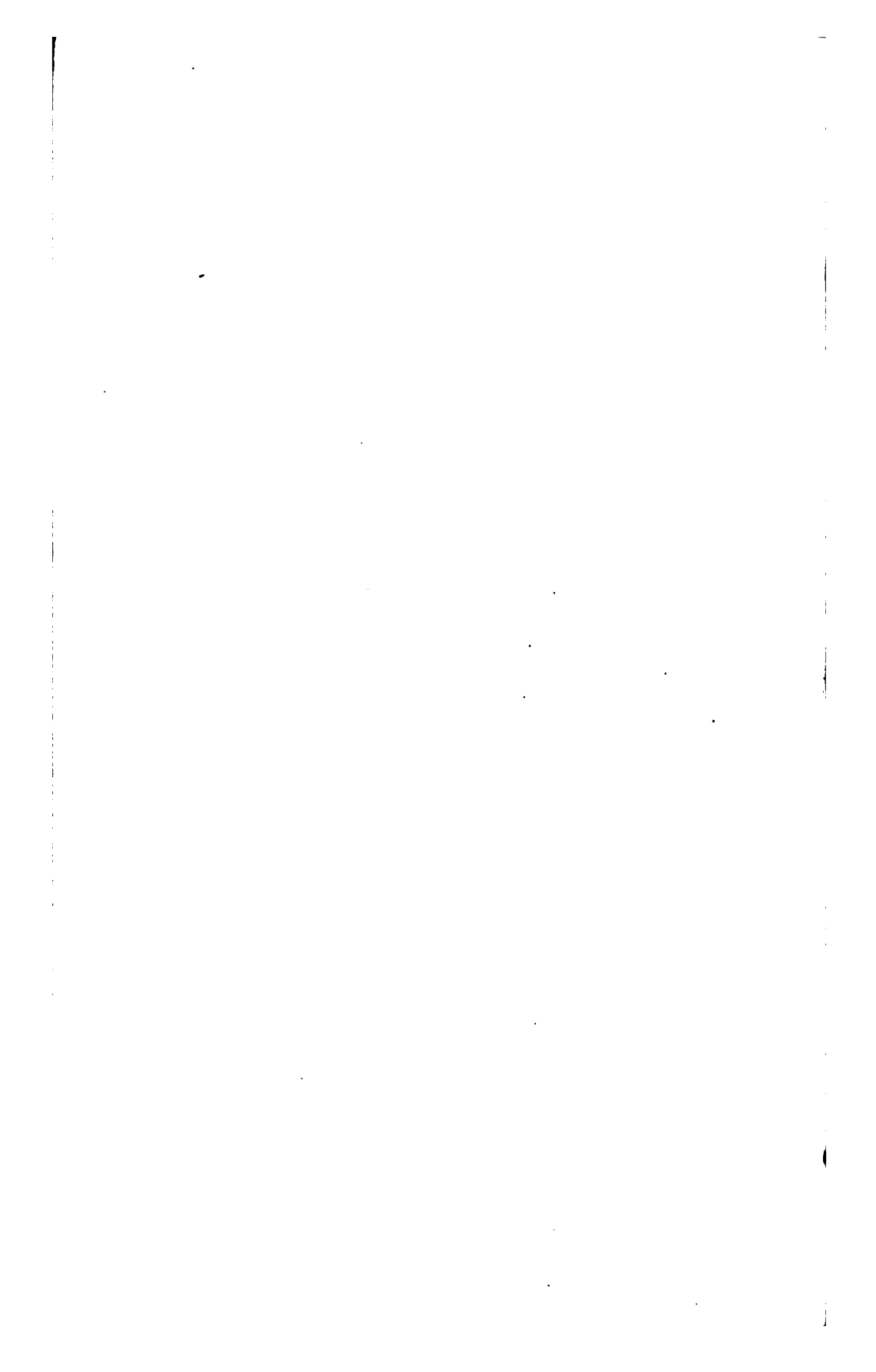


















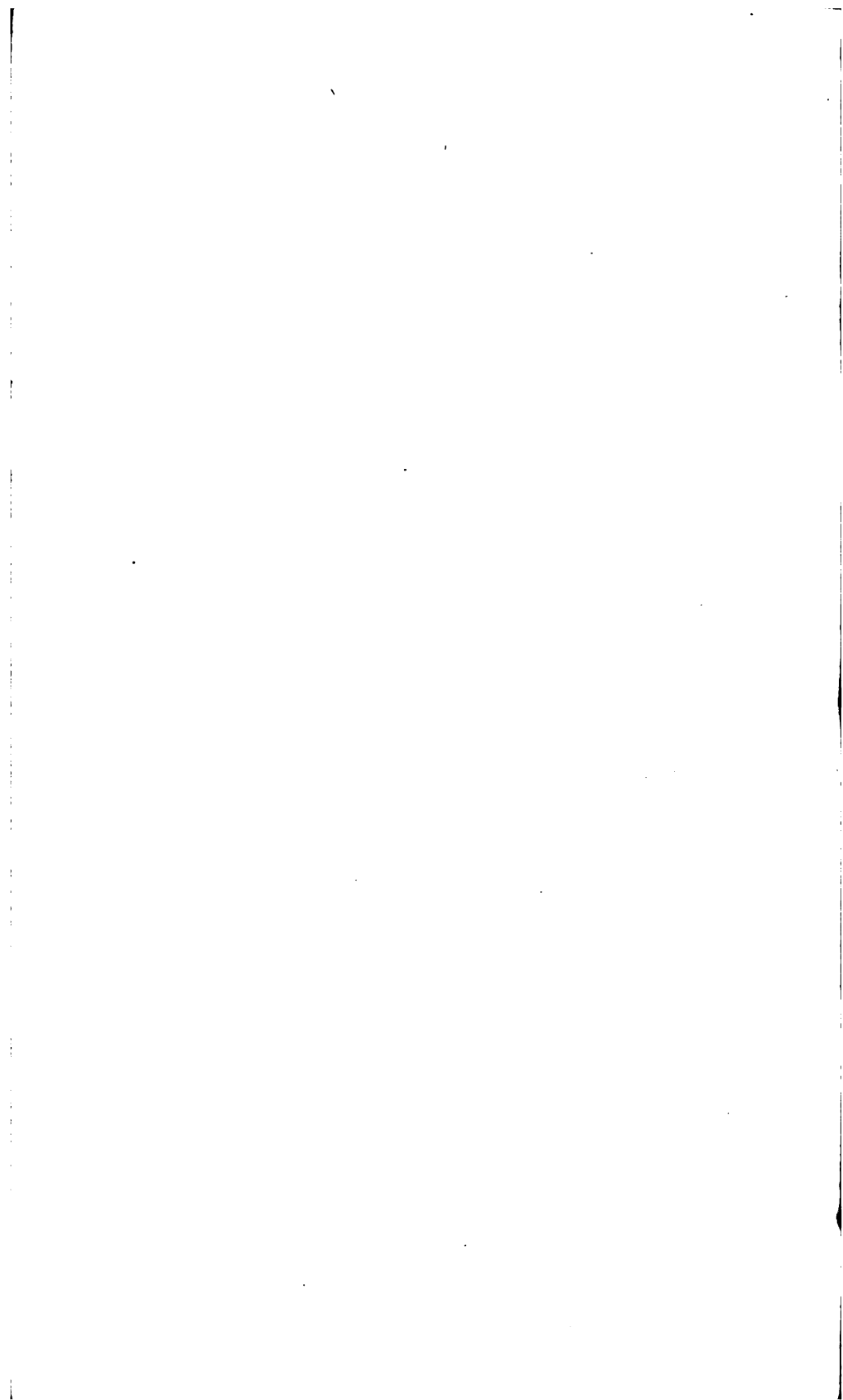










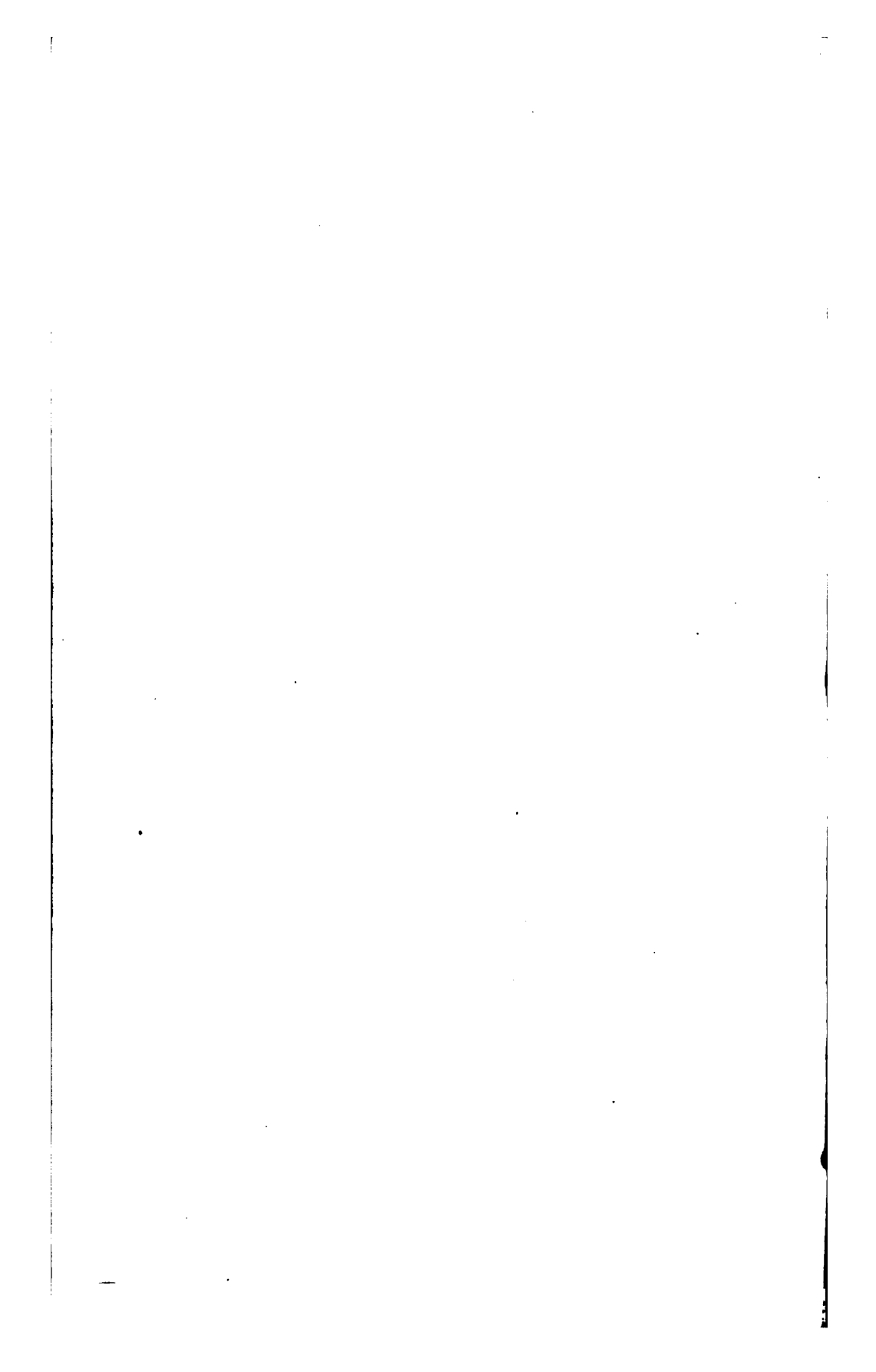


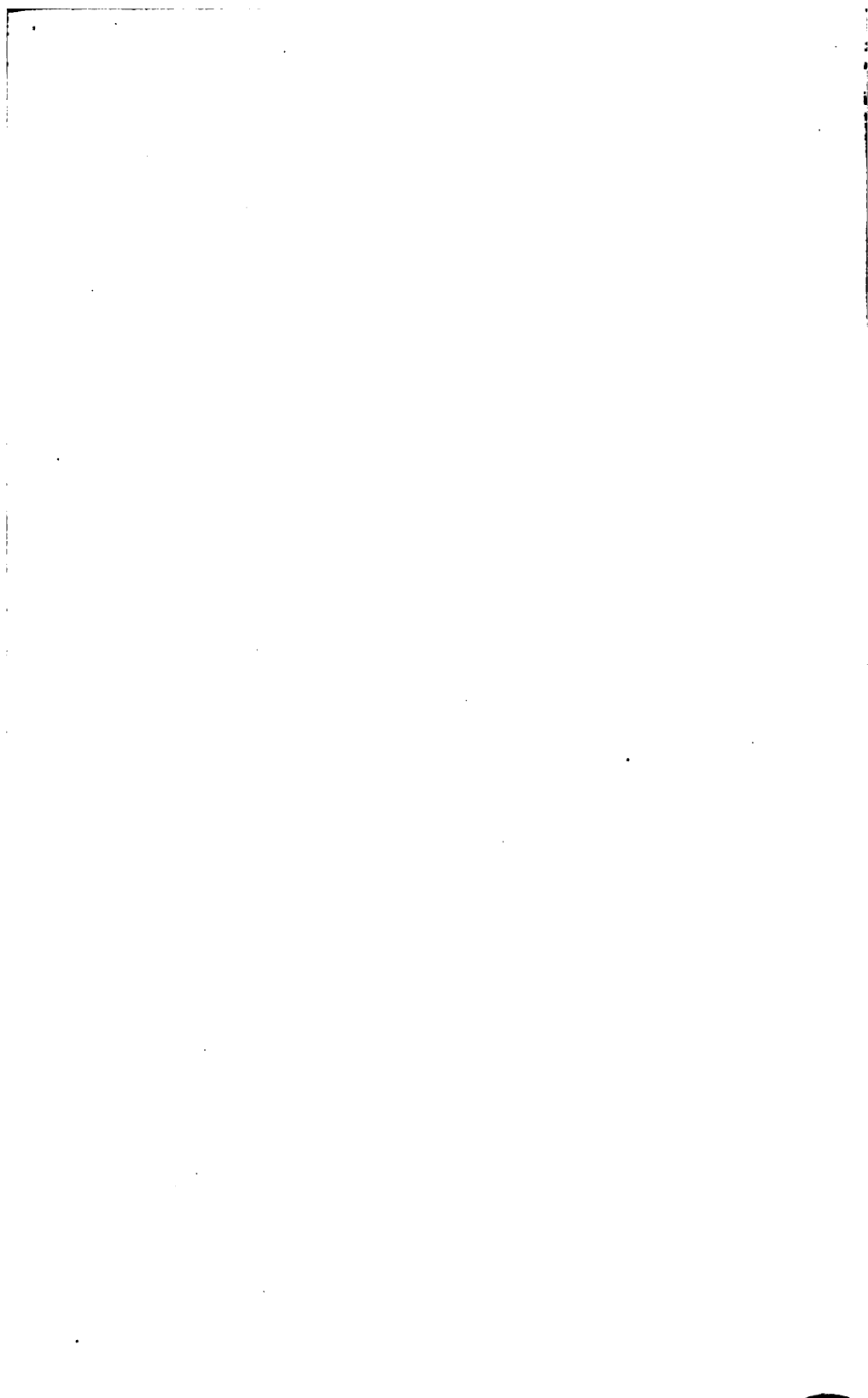












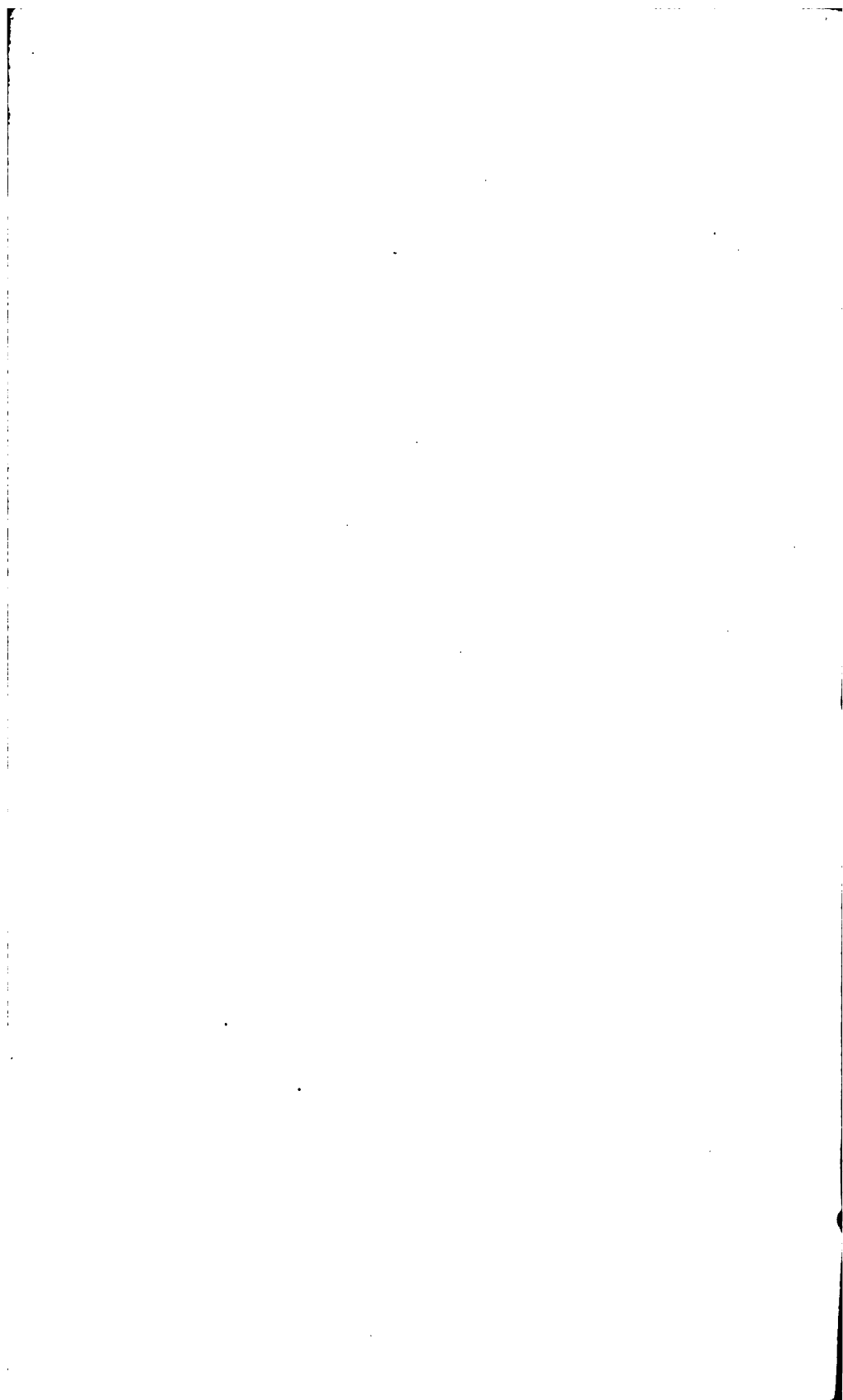








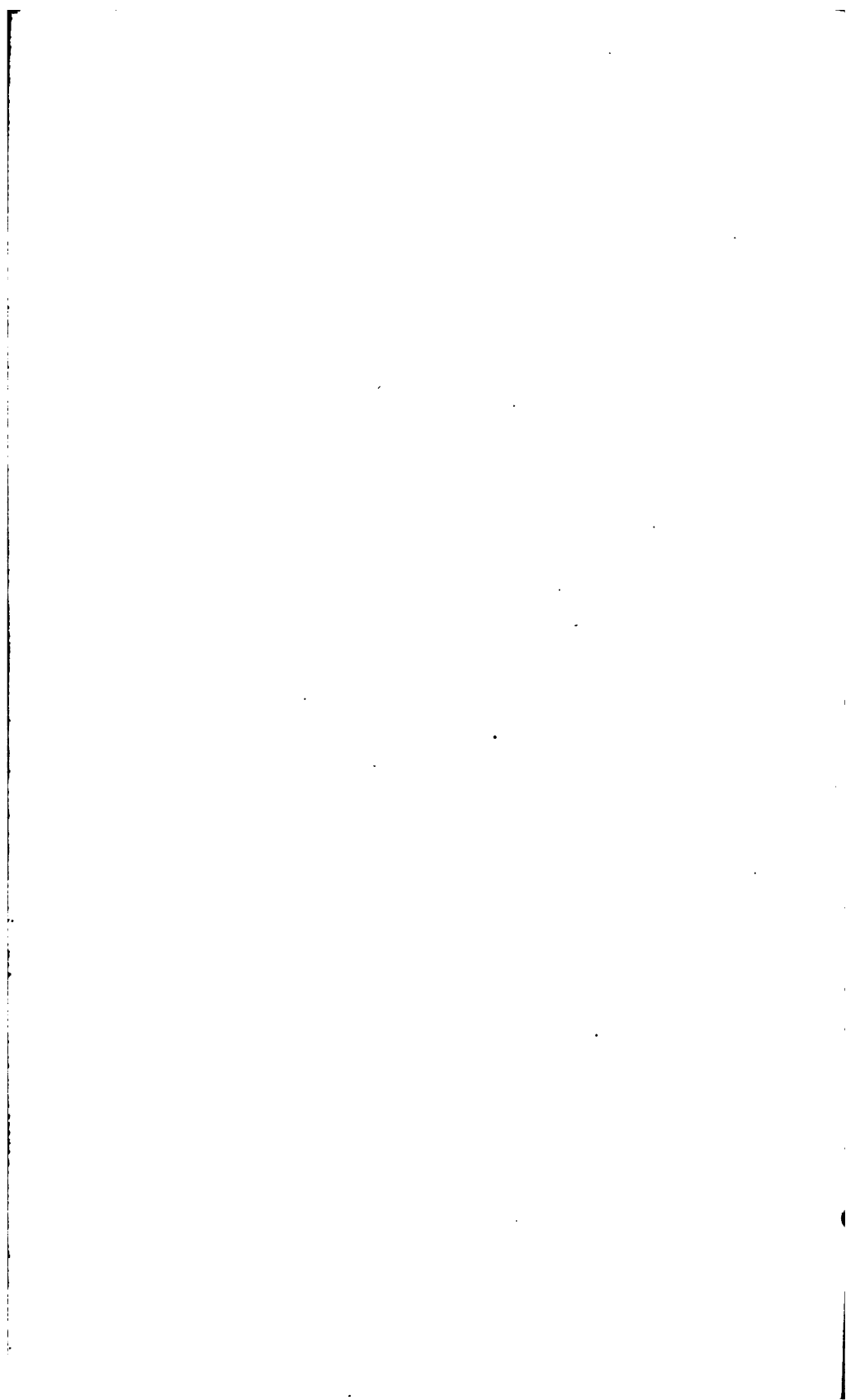


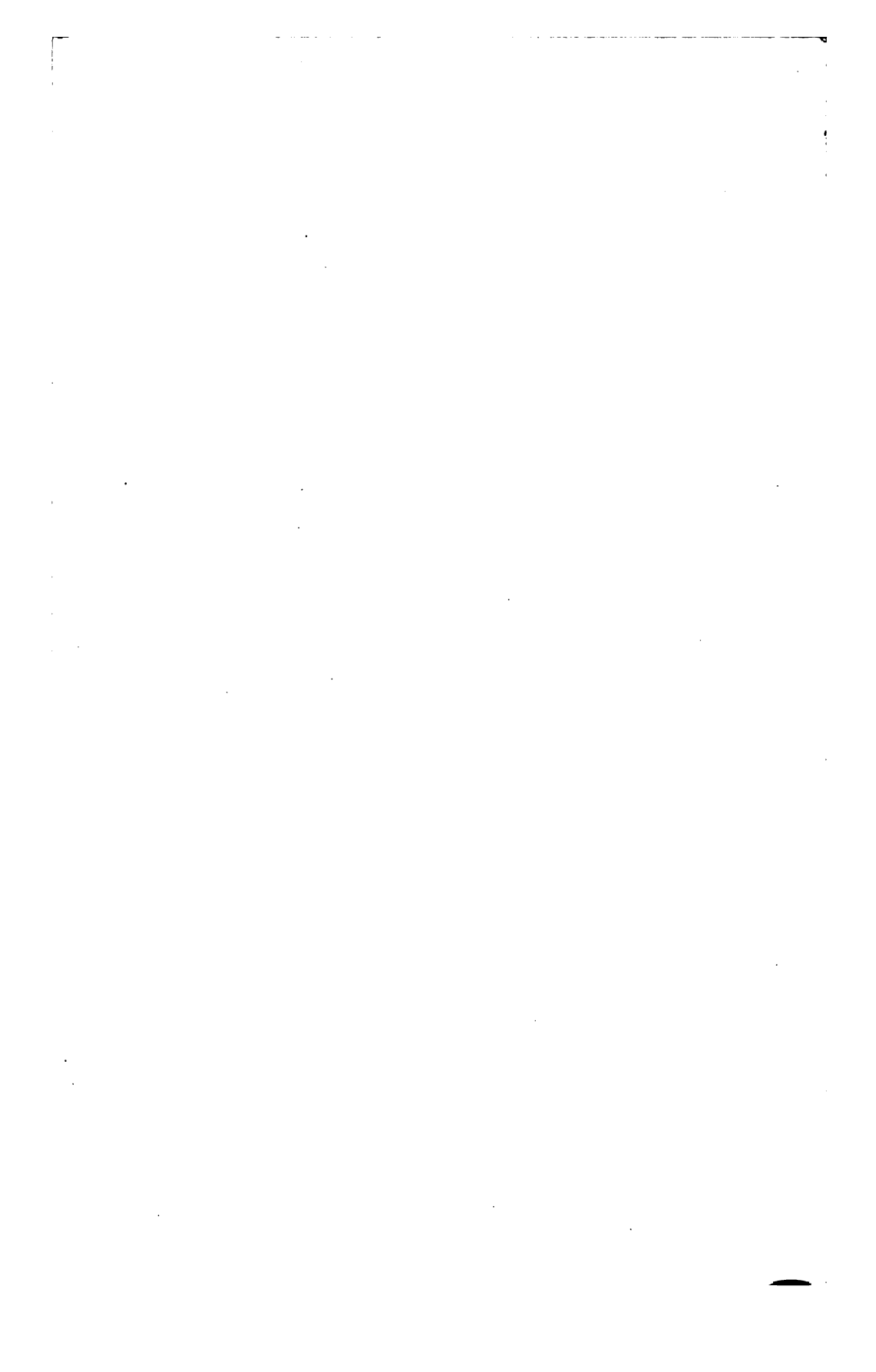






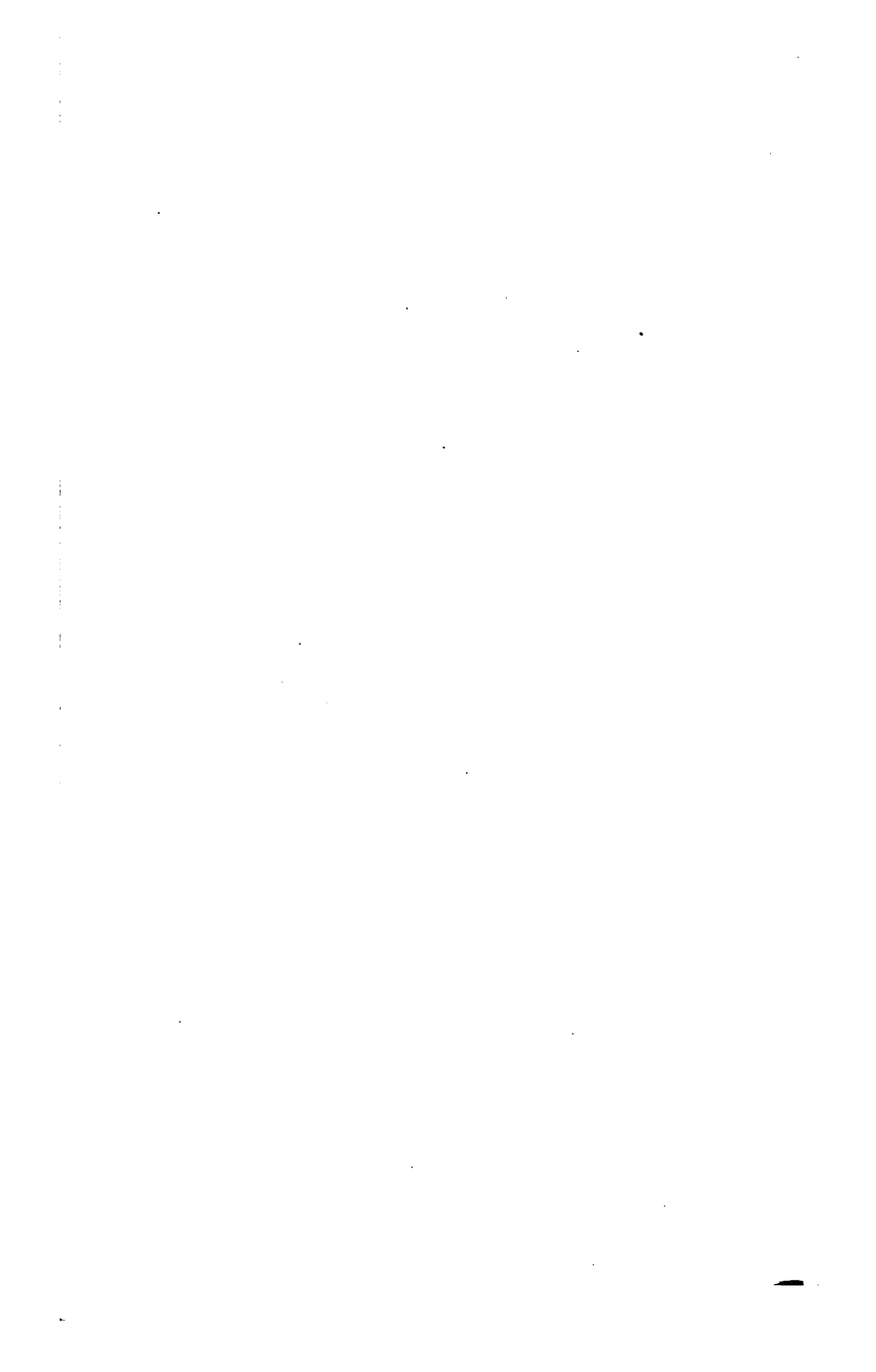


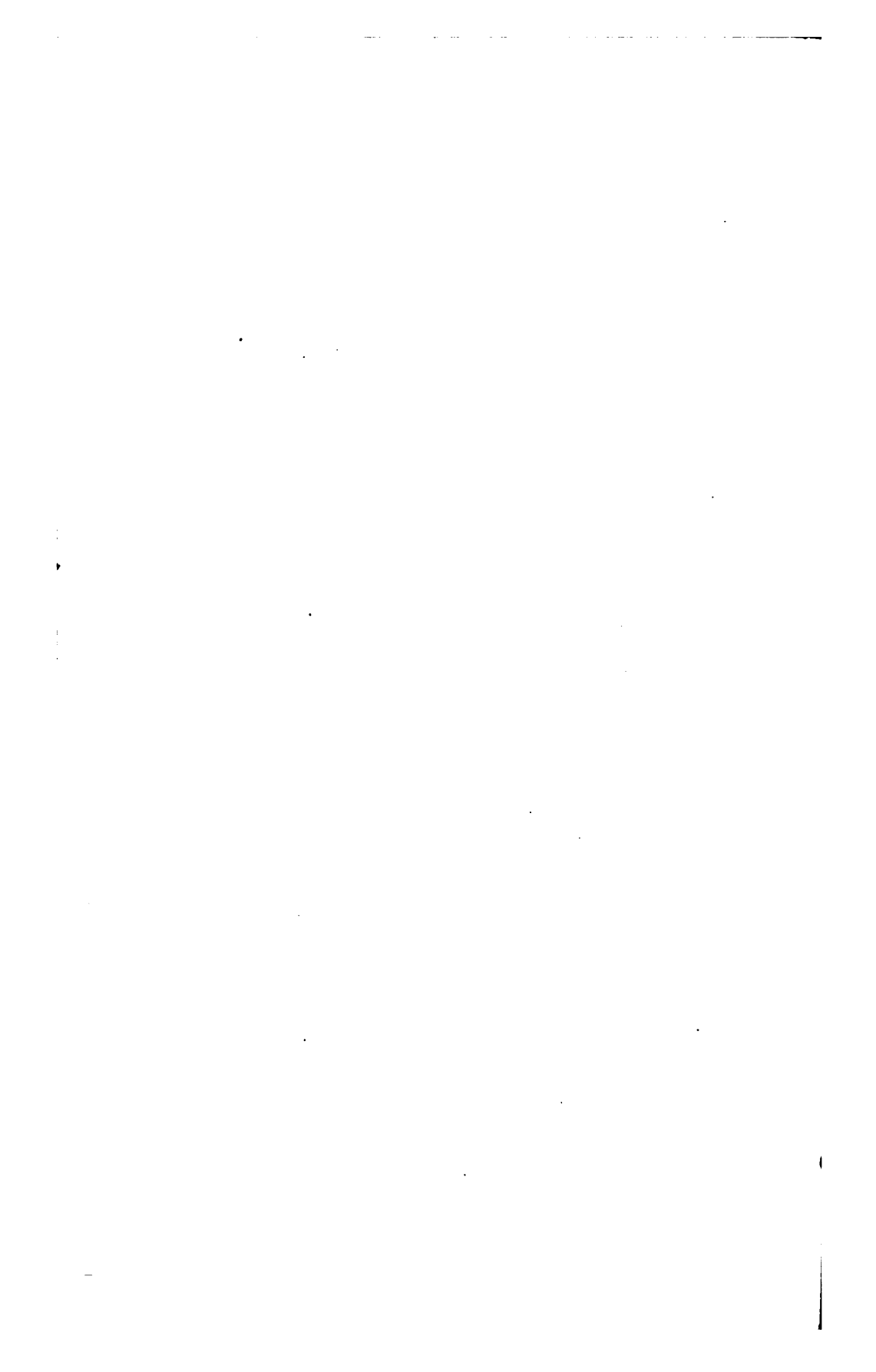




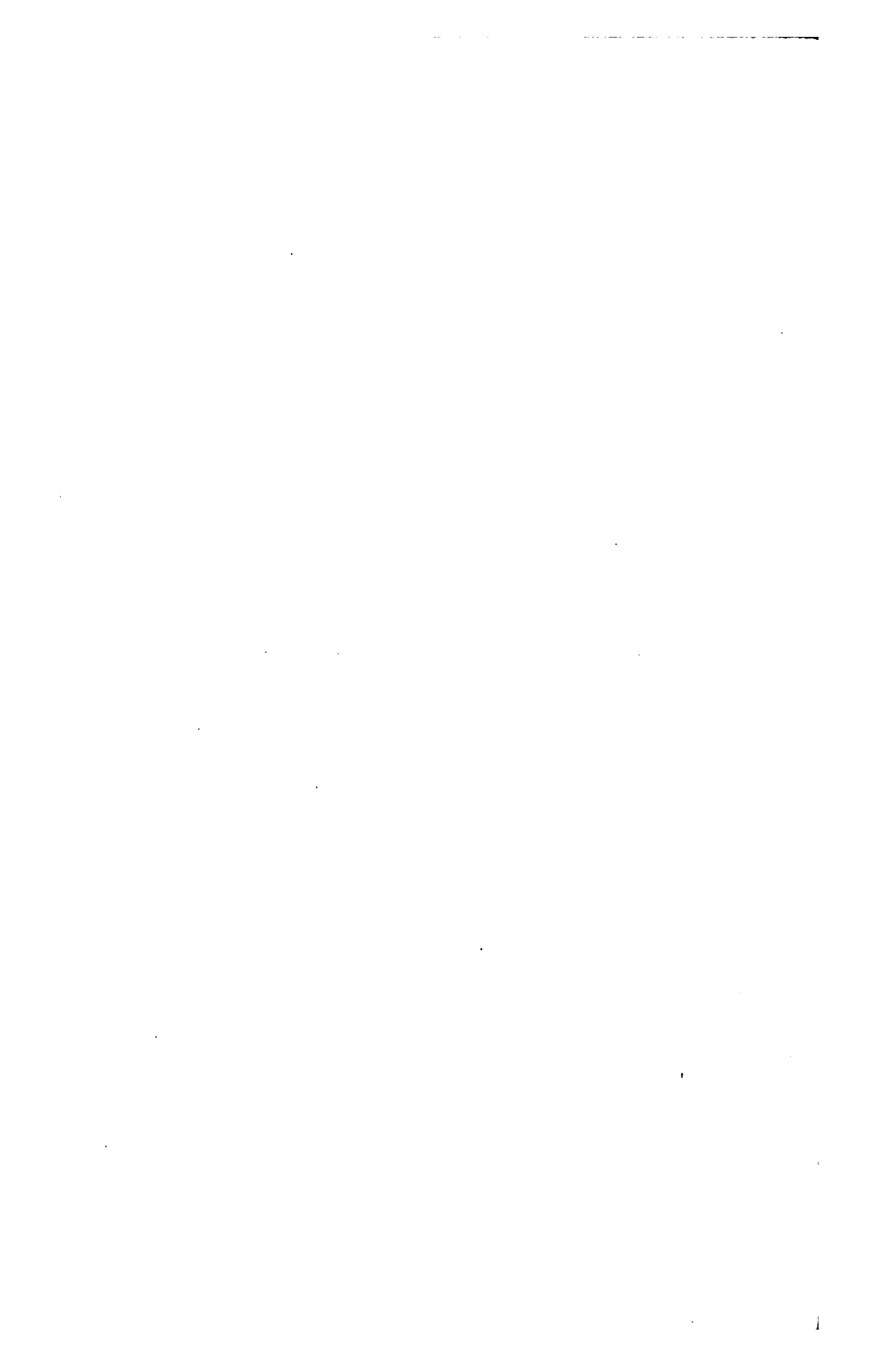




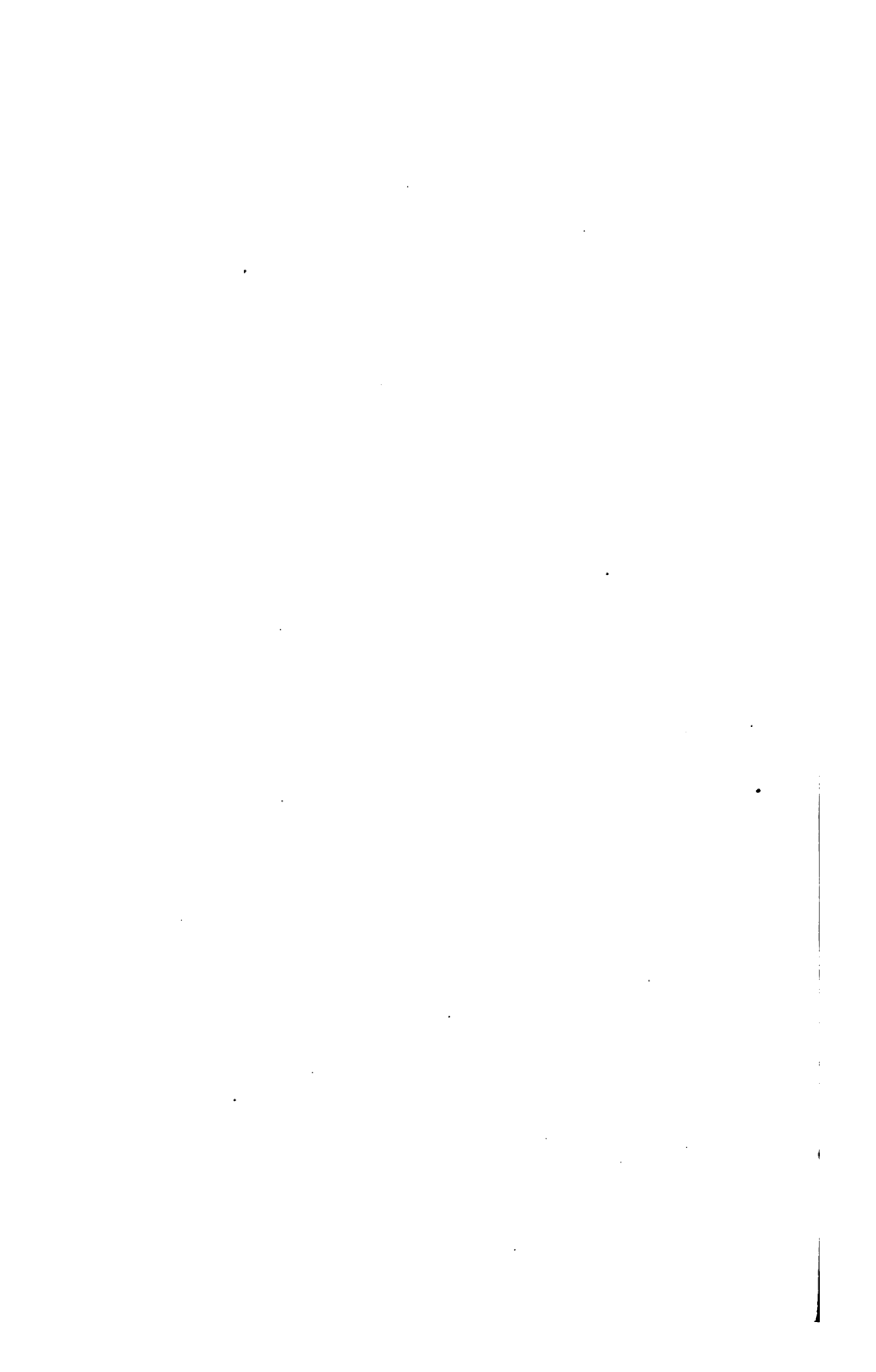


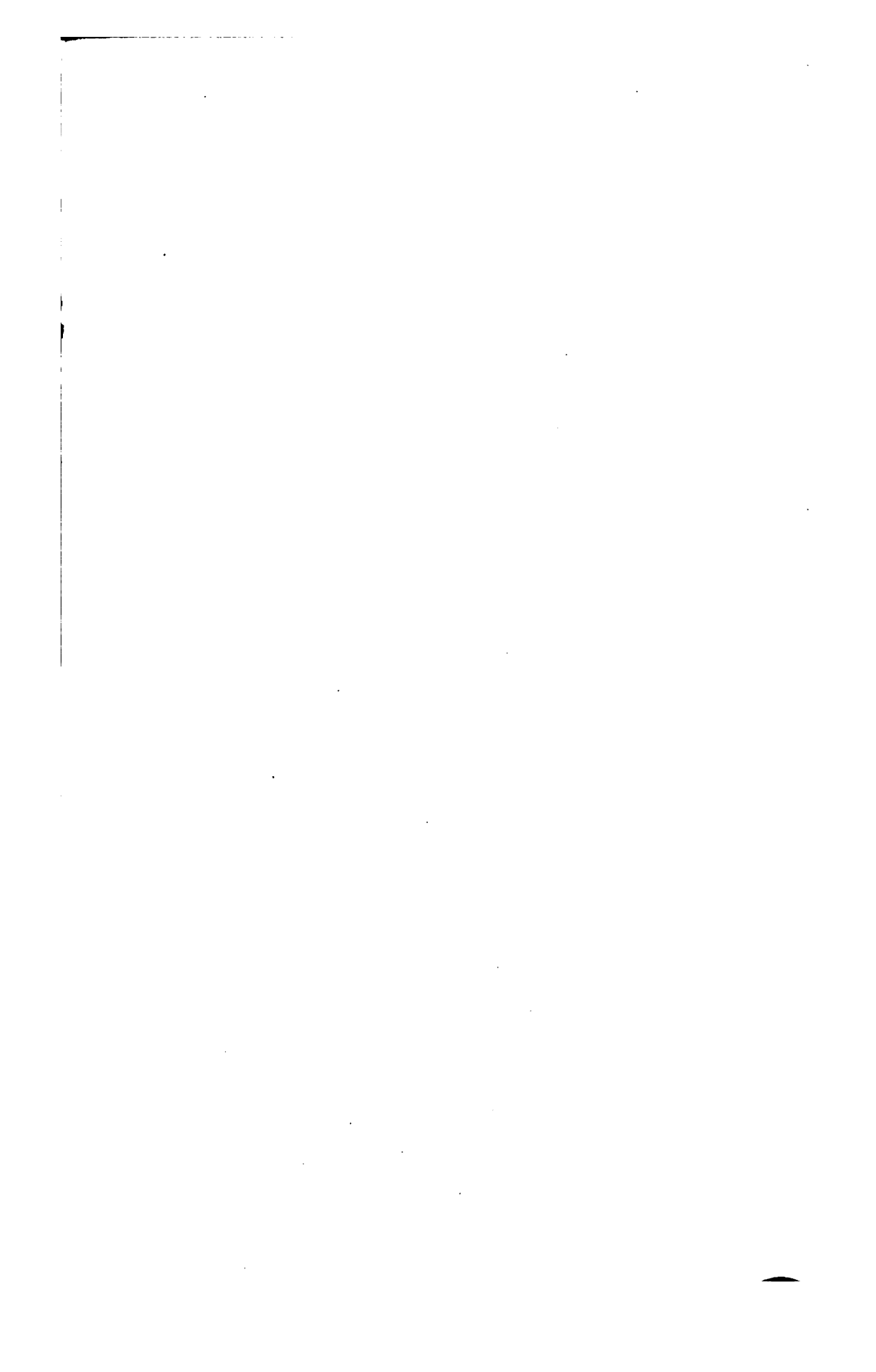


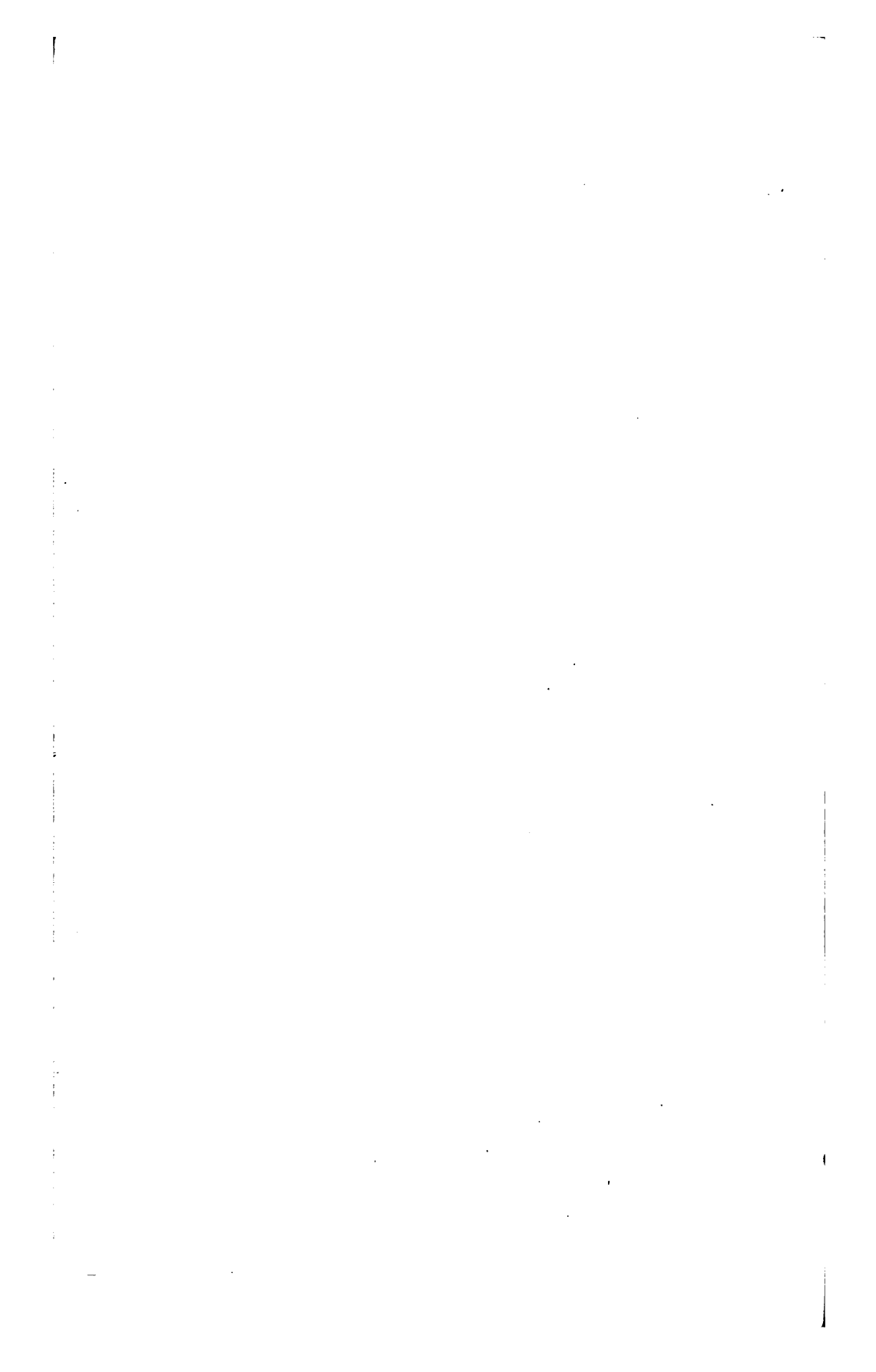






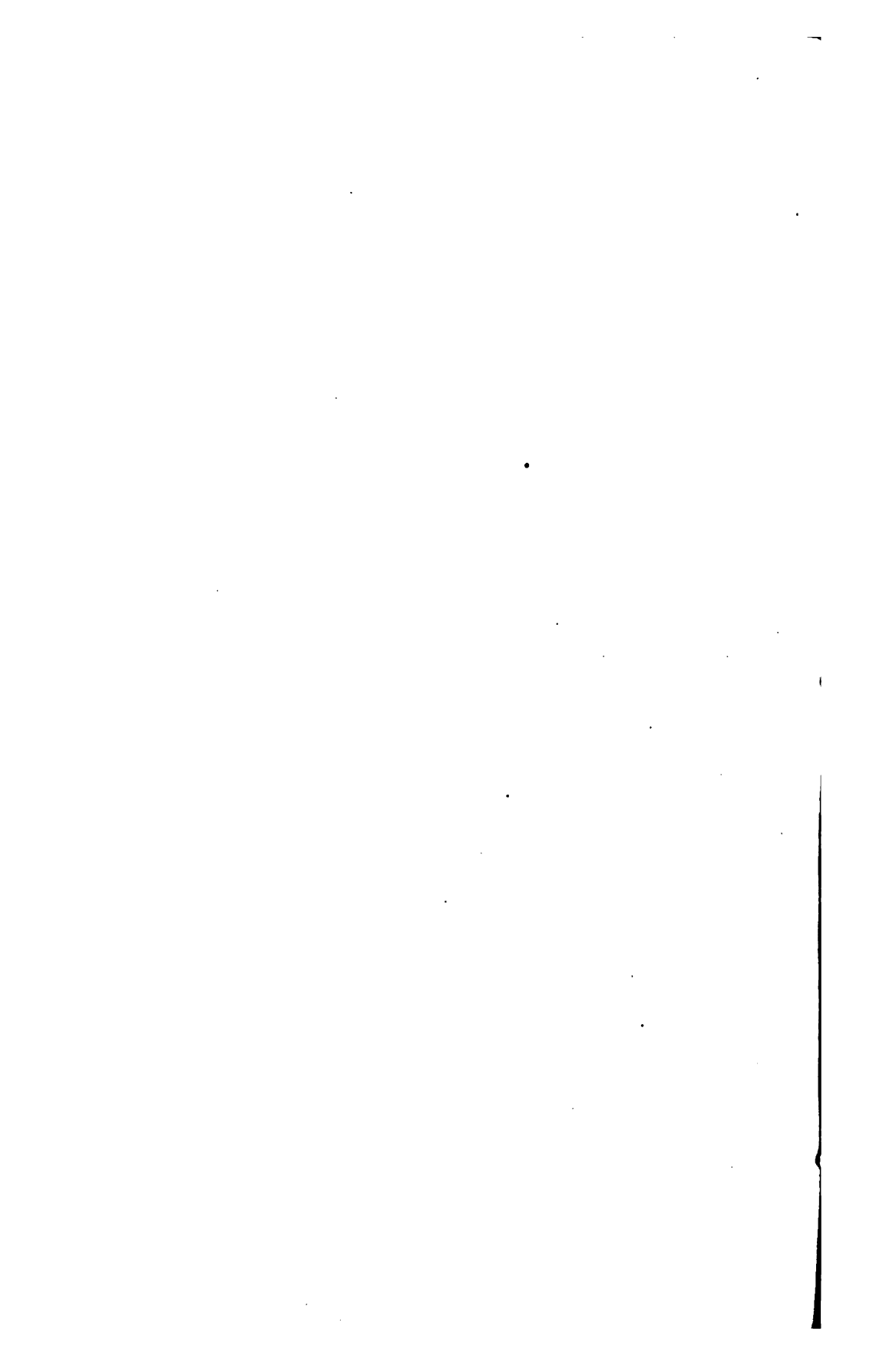






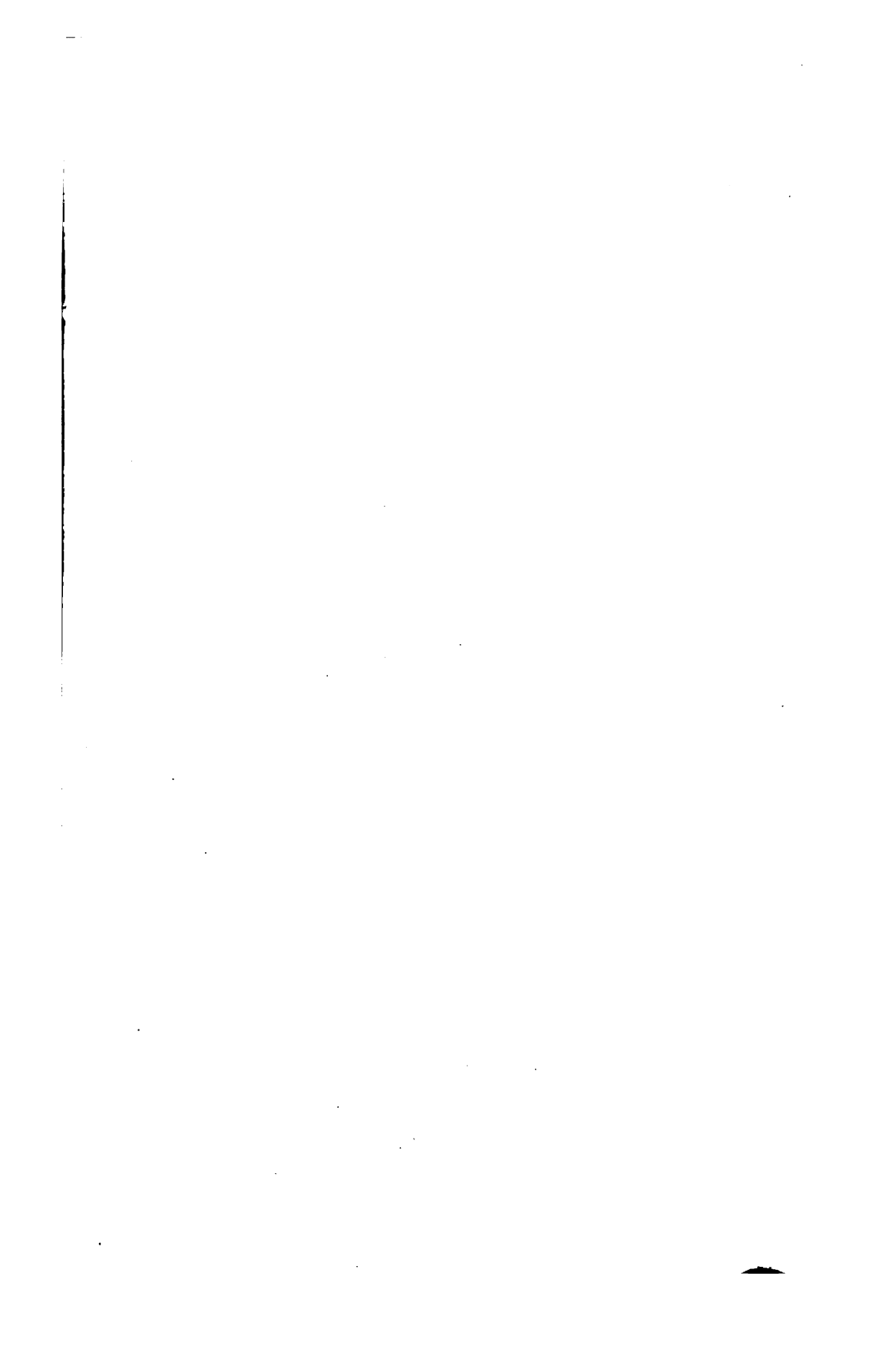


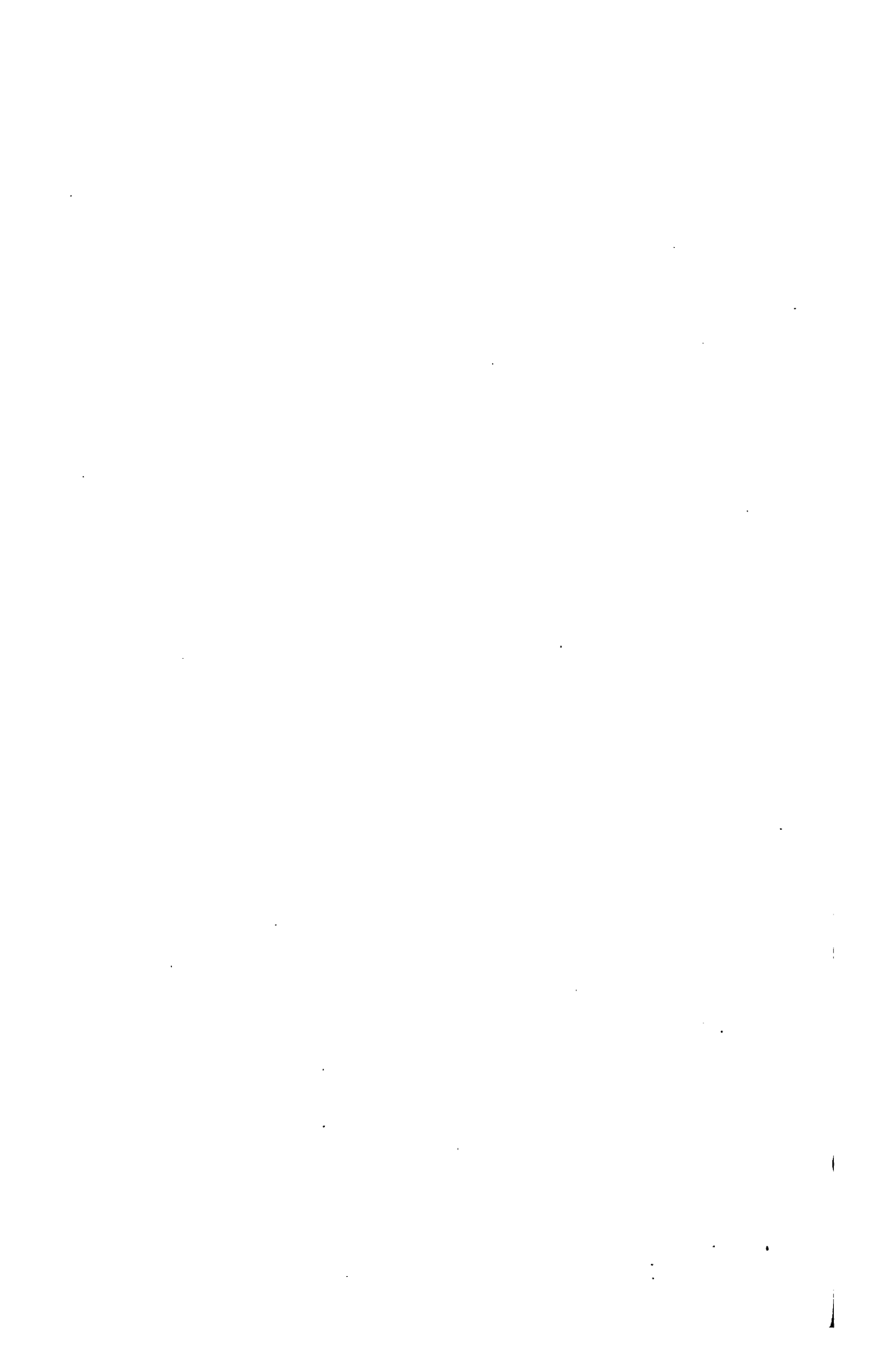










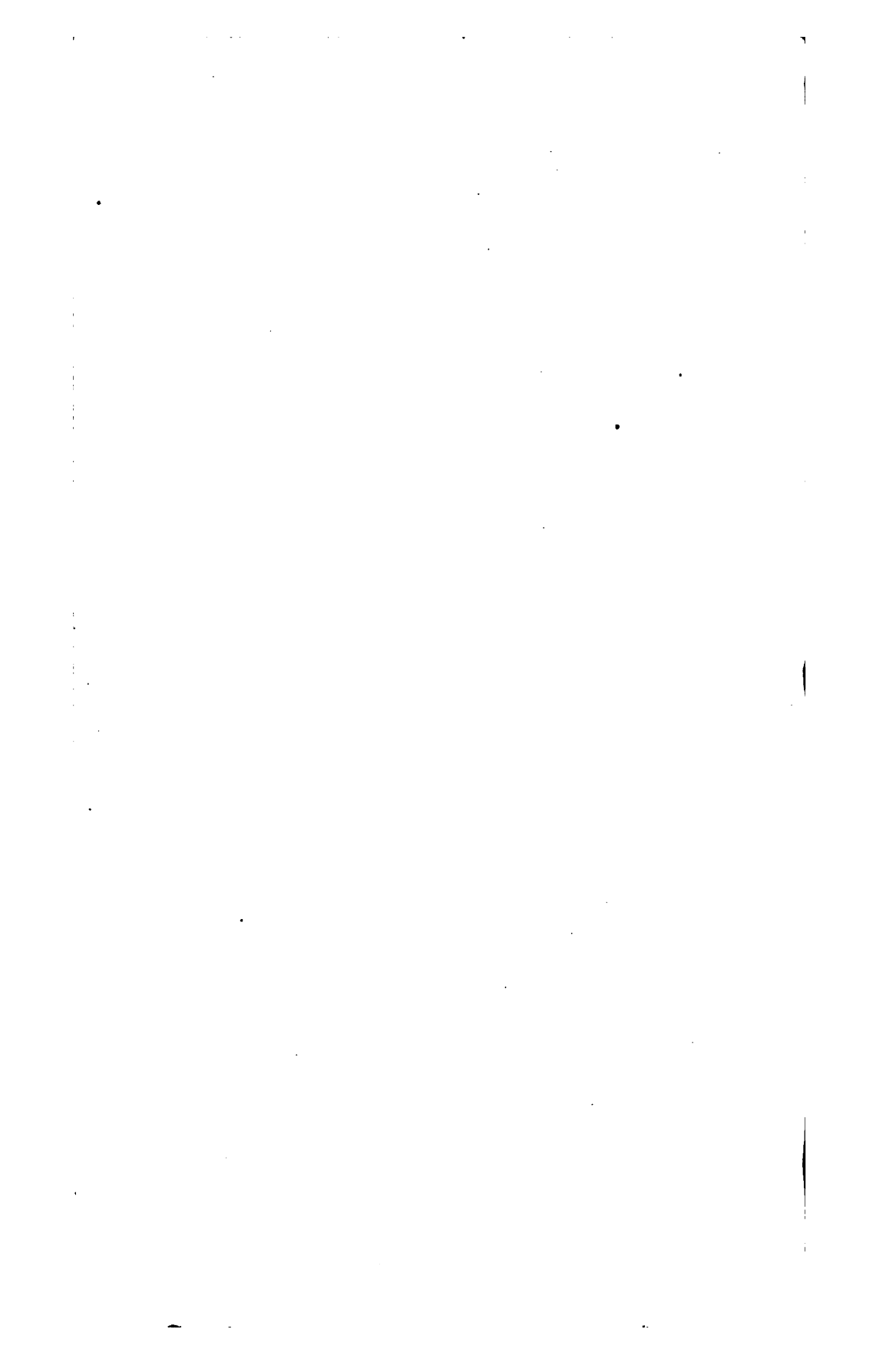


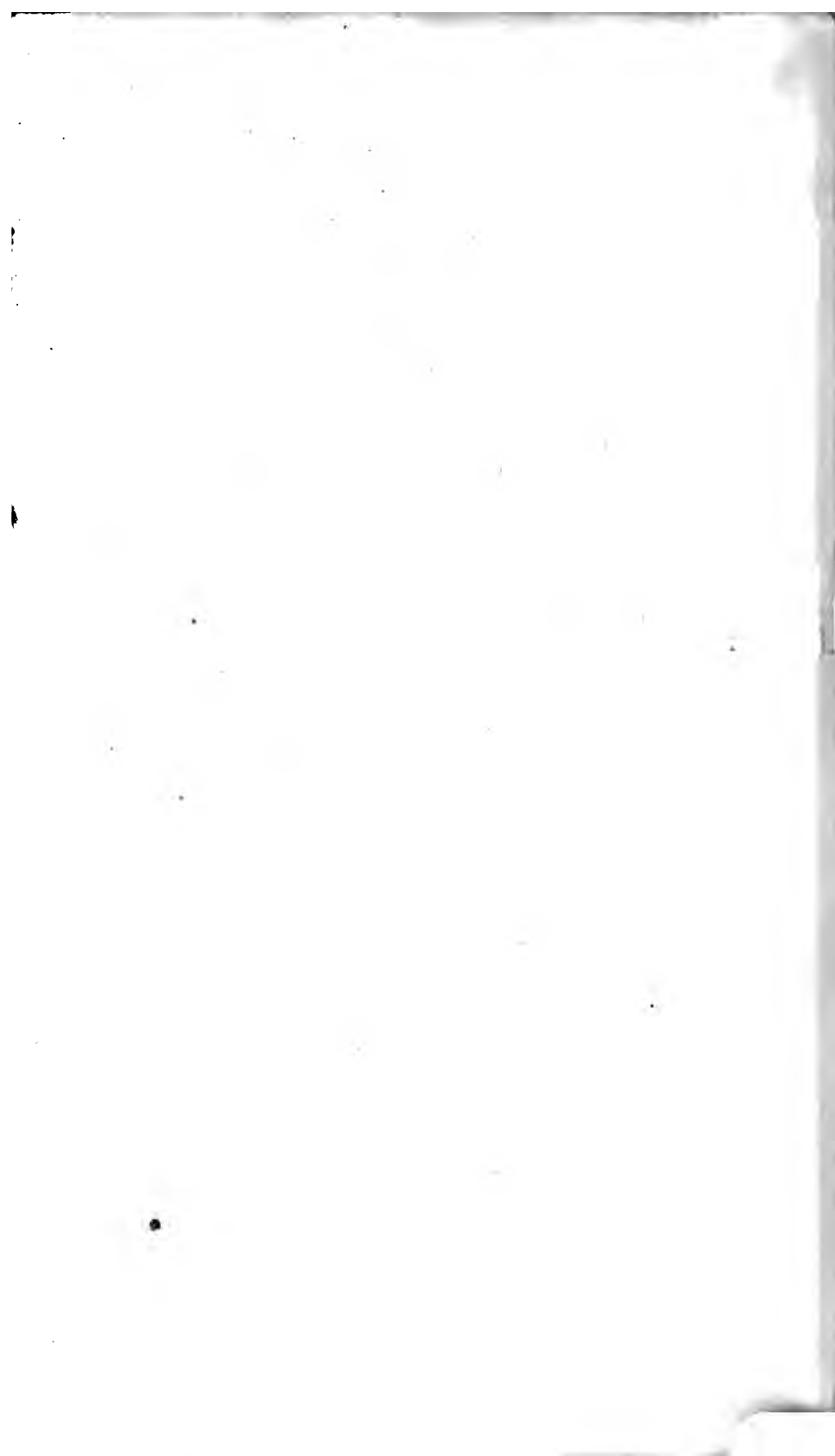


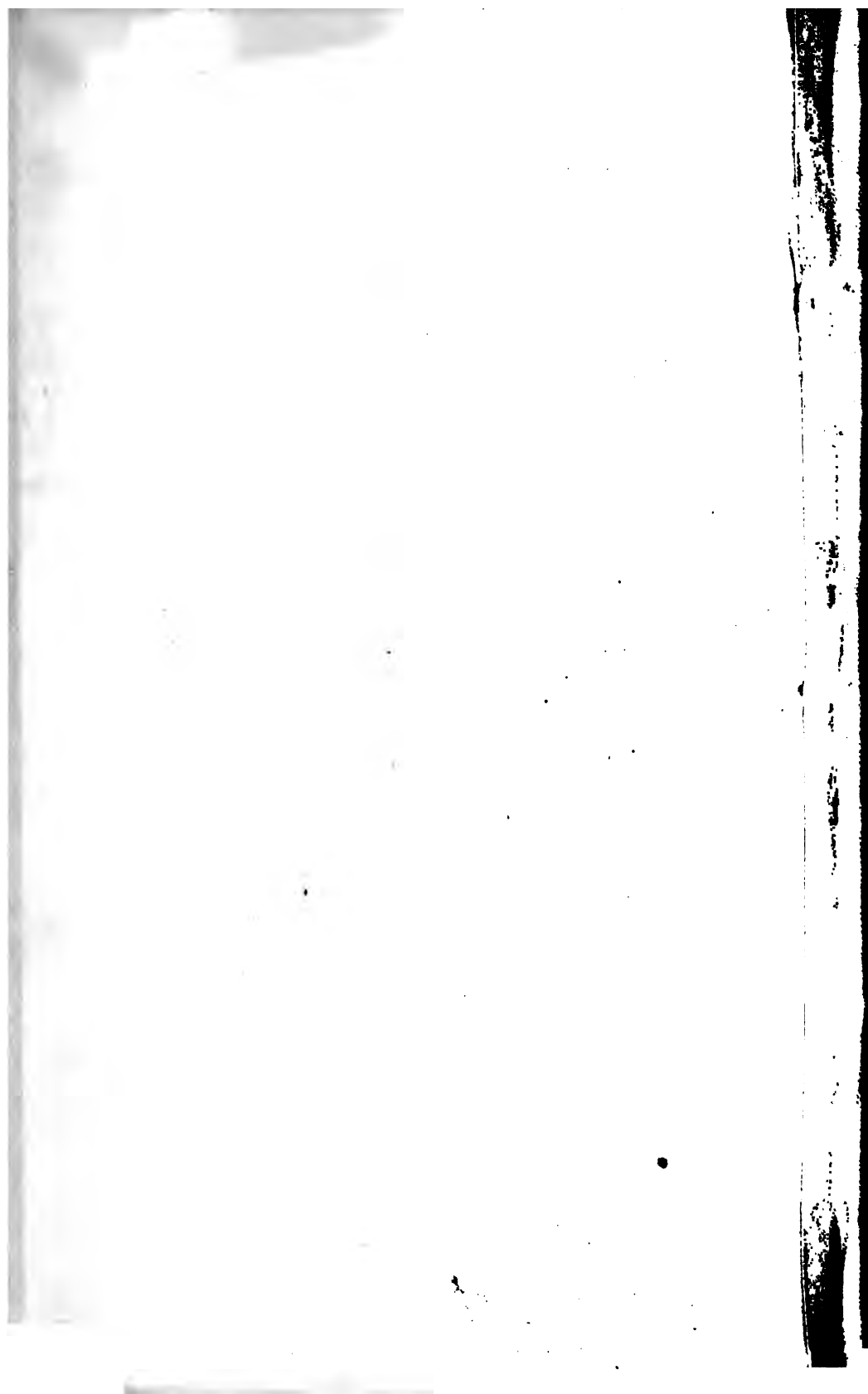












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